Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1451

FREDERICK B. PFISTER,

Petitioner

v.

HONORABLE NEWELL EDENFIELD
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al,

Respondents

MOTION FOR LEAVE TO FILE PETITION, AND PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

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MOTION FOR LEAVE TO FILE PETITION, FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

Frederick B. Pfister, petitioner herein, by his undersigned attorney, moves this Court as follows:

1. For leave immediate, to file the petition for common law writ of certiorari and/or writ of mandamus and/or prohibition, and/or injunction annexed herewith.

2. After granting leave, to issue a common law writ of certiorari and/or writ of mandamus and/or prohibition and/or injunction, directed to Respondents Honorable Newell Edenfield, and Robert Hall (assigned successor district judge) and to the United States Court of Appeals for the Fifth Circuit in accordance with the prayer of petitioner; and affording petitioner such other and further relief herein as this Court determines just and proper.

DATED March 15, 1980

Respectfully submitted,

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PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

Frederick Pfister, Petitioner herein, prays that common law writs of certiorari issue to review the orders of the District Court filed on December 21, 1978 (Appendix A) and July 2, 1979 (Appendix E) dismissing Petitioner's complaint for compensatory and punitive damages for breach of fiduciary duties; to review orders of the Court of Appeals for the Fifth Circuit filed on July 3, November 5, November 13, and December 5, 1979, (Appendix F, I, J, K), respectively. Petitioner further prays that writs of mandamus and/or prohibition and/or injunction issue to the District Court and Court of Appeals, Respondents herein, restraining said respondents from enforcing said orders and commanding that Respondents vacate said orders expeditiously and for cause Petitioner shows as follows:

OPINIONS BELOW

The orders and opinions of the District Court and Court of Appeals, the subject of the within motion, are unreported at this time. The orders of the District Court, Respondent Edenfield, appear at Appendix A and Appendix E of the Separate Appendix. The orders of Respondent Court of Appeals appear at Appendix F, Appendix I, Appendix J, Appendix K, respectively of the Separate Appendix.

JURISDICTION

Jurisdiction to grant the common law writ of certiorari and the writs of mandamus and/or prohibition and/or injunction to prevent enforcement of the orders entered by Respondent, District Court, and Respondent Court of Appeals, is conferred on this Court by provision of Section 1651(a) Title 28, United States Code, and Rule 30 of the Rules of this Court. The mandate of the Court of Appeals respecting the subject orders was issued on December 18, 1979 as more fully appears in Appendix L of the Separate Appendix.

QUESTIONS PRESENTED

1. Whether a District Court having flaunted Congressional intention and a federal statute's commands to create a federal fiduciary standard of care fashioned from federal substantive law, thereby leaving Petitioner remedieless for injury committed by fiduciary misconduct; and having eliminated as a matter of law compensatory and punitive damage redress for the injury occasioned by fiduciary misconduct; and having further misstated the character of petitioner's law suit, which derives solely from breaches of fiduciary and tort duties owed petitioner; and where such District Court acted to obscure appellate consideration, is answerable by writs of mandamus or prohibition or injunction in this Court.

2. Whether a Court of Appeals, balking its jurisdiction, to cure and correct serious irregularities and impermissible anomalies in the District Court orders, and which makes further rulings that profoundly impede and impair petitioner's, not yet litigated ERISA substantive rights, is held answerable in this Court by prescriptive writ of mandamus, prohibition or injunction.

3. Whether this Court, under its prerogative power to grant a writ of common law certiorari should act now to completely review the subject orders of the District Court, and Court of Appeals, where said orders are fundamental to further conduct of the litigation, and will irreparably destroy, if not cured herein, the very fiduciary protections sought vindicated by the petitioner in his litigation, where both the District Court and the Court of Appeals making said orders are with taint.

STATUTES INVOLVED

This case involves first impression interpretation of the fiduciary and various other provisions of the Employee Income Security Act of 1974, 29 U.S.C. § 1001 et. seq., hereinafter ERISA. Specific statutory provisions are cited herein, and set forth in their complete text in the Separate Appendix at Appendix P.

They are as follows: 29 U.S.C. § 1001, 29 U.S.C. § 1024; 29 U.S.C.§ 1031; 29 U.S.C. § 1104; 29 U.S.C. § 1105; 29 U.S.C. § 1106; 29 U.S.C. § 1109; 29 U.S.C. § 1131; 29 U.S.C. § 1132; 29 U.S.C. § 1133; 29 U.S.C. § 1136; 29 U.S.C. § 1140; 29 U.S.C. § 1141; 29 U.S.C. § 1144.

CONSTITUTIONAL PROVISIONS

THIS CASE ALSO INVOLVES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION SET OUT COMPLETELY IN APPENDIX Q, BUT WHOSE PERTINENT PROVISIONS PROVIDE:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

STATEMENT OF CASE

A. Pre-Transfer Proceedings

Petitioner PFISTER commenced suit on October 26, 1976 pursuant to Section 29 U.S.C. Section 1132, (Appendix P) of the Employee Retirement Income Security Act of 1974, hereinafter ERISA, for Retirement Income Security Act of 1974, hereinafter ERISA, for damages occasioned by the Respondents, and each of them, for substantial violations and breaches of the fiduciary duties under ERISA, 29 U.S.C. Section 1104, 1105, 1106, (Appendix P) as well as for torts committed by the Respondents recognized at common law as fraud, misrepresentation and deceit; intentional and negligent infliction of emotional distress and mental harm; breach of the implied duty of good faith and fair dealing; tortious interference with a fiduciary relationship; and injunctive relief seeking to enjoin the Respondents from committing further characteristic violations of his rights, and to deter further discrimination preventing the Petitioner and others like him, from enjoyment of Plan benefits.

Respondent DELTA FAMILY CARE PLAN, hereinafter "Plan" is a generic reference embracing the Delta Disability and Survivorship Plan (Disability Benefits) and the Delta Family Care Retirement Plan (Pension Benefits), and is an employer-dominated Plan entity designed, administered, supervised, and enforced by DELTA AIR LINES, INC., hereinafter "Delta" and, specifically, by senior executives of Delta. The Plan confers substantial tax benefits in the form of tax deductions to the Defendant DELTA, who in 1975 paid no corporate income taxes; and in 1976, virtually none. The PLAN is operated and discharged free from the surveillance of the insurance regulatory commission and is otherwise not subject to scrutiny or watch by collective bargaining (DELTA is a non-union employer which self funds its employee benefits).

Respondent PLAN is an employer-motivated instrument which distributes as much, if not more, economic consideration upon the Defendant DELTA than it does upon Petitioner, whose exclusive best interests according to ERISA is the interest that is to be statutorily served by the Plan. In fact, the PLAN is an alter-ego of Respondent DELTA and impacts directly upon the Petitioner, and other Plan beneficiaries, with no interposing third party presence.

Petitioner states Respondents have intentionally and knowingly carried forward a program of fraud and oppression, designed and maliciously intended to disenfranchise PFISTER from "protection" owing to him under the PLAN. PFISTER acknowledges that in order to be eligible for protection under the PLAN he must be either an employee of DELTA or permanently, totally disabled. The gravamen of the PFISTER charge is that the Defendants in conspiracy one with another in violation of their federal fiduciary duties to act exclusively in the Petitioner's best interest and in a manner characteristic of a reasonable prudent man, and in good faith, 29 U.S.C. § 1104, 1105, 1106, have malevolently denied him entitlement and access to either status necessary for his enjoyment of benefits

under the PLAN. The fact that PFISTER is permanently, totally disabled compounds the gravity of the Respondents' fiduciary misconduct.

PFISTER relying upon the representations made to him by Respondents that he need not worry about protecting against sickness, injury, retirement security, etc. because Respondents would guarantee these protections to him under the provisions of the PLAN, alleges injury by electing against his prior employer's benefit plan and refraining from seeking any independent coverages to protect for the catastrophic circumstances that now beset him—having relied upon the fiduciary duties of DELTA and PLAN to act in his best interest and ensure his well-being.

PFISTER alleges that Respondents recognized his total and permanent disability; and that while his overall physical condition had steadily deteriorated, the PLAN acting through the Respondent STEPHENS, not identifying himself to the Petitioner as an executive of the Plan—but, DELTA instead—summarily rescinded his total and permanent disability status. Further, PFISTER alleges that all his ancillary coverages as defined under the DELTA FAMILY CARE PLAN—including group, life, health, hospital and other coverages—were also brusquely, without explanation, unilaterally cancelled. (Appendix S)

Due to the seriousness of industrial injuries which rendered Pfister totally disabled from any occupation in November 1974, one physician recommended a spinal fusion. And from March 1974 through August 1975, Pfister was prescribed medication—including such narcotics as percodan, butazolidin, decadron, sterozolidan, indocin—to reduce swelling and inflammation and to alleviate pain associated with his injuries. In August 1975, a few short months after Petitioner's benefits and protections under the PLAN were summarily cancelled by Delta's March 5, 1975 letter, (Appendix S) the ravages of drug therapy having produced serious adverse reactions in the

Petitioner since September 1974 and dramatically in March 1975, as confirmed by medical records of the treating physicians, Pfister was hospitalized in emergency surgery. In August 1975 an exploratory laparotomy revealed Pfister suffered from an acute perforated appendix further complicated with serious intra-abdominal abscessing. After a substantial hospital stay, Respondents summarily refused payment of Petitioner's hospital costs and bill citing their March 5 letter.

Petitioner made several demands upon the PLAN and other DELTA executives participating in the summary and brusque cancellation of his disability, hospital, insurance and pension benefits for guidance concerning the proper presentation of his grievance and the improper termination of his PLAN benefits—aforesaid requests and demands rebuffed by Respondents. Pfister's demands and requests for PLAN documents, procedures, policies, and the like which would enable him to process his grievance were also ignored in conscious disregard of Respondents' fiduciary duties. Moreover, the Respondents at no point appraised the Petitioner of his conversion opportunities with respect to the cancellation of his PLAN benefits; and, in fact, said benefits were cancelled March 1, 1975—the same day Petitioner's disability status was rescinded, in total derogation of the PLAN's own specifications respecting conversion opportunities available to beneficiaries of the PLAN.

Petition has further claimed the Respondents DELTA acting on the behalf of the PLAN not only failed to provide him with the documents demanded, required under ERISA and ERISA's predecessor, the Welfare Pension Plan Disclosure Act, but also that the subject documents were not on file at the United States Department of Labor from August 1973 up and through September 1976. Further, no Respondent Fiduciary communicated with the Petitioner or provided him assistance and information necessary for the preservation and exercise of his ERISA or plan rights.

After **Petitioner was certified in November 1974 as totally disabled from any occupation by his treating physician,** Respondents DELTA and ADUDDELL, as well as others sought to force the Petitioner to resign and thereby forfeit all his PLAN protections voluntarily, which Respondents later terminated involuntarily.

Petitioner states that false representations were made for the purpose of influencing him to meet with representatives of Respondent BREWER ADJUSTMENT COMPANY (hereinafter BREWER) and its key employee Charles Bishop. Said Respondents BREWER and BISHOP, though represented as independent contractors, were under the control of Respondent DELTA and served the exclusive interests of Respondent DELTA at detriment to Petitioner, a PLAN beneficiary, in violation of the PLAN's fiduciary duty to act exclusively in the best interests of Petitioner. Respondent BREWER and BISHOP were not retained, hired, and paid by the Respondent PLAN, but by the Respondent DELTA—DELTA having usurped a PLAN function belonging properly to the PLAN and in total derogation of Petitioner's rights to have BREWER and BISHOP act as the agent for the fiduciary PLAN in a manner comporting with Petitioner's exclusive best interest, not DELTA's.

The administrative due process provisions—29 U.S.C. § 1133 (Appendix P,) built into the ERISA statute require, at minimum, that the Petitioner be provided with the following information by the PLAN Fiduciary participating in the denial of his claim for benefits:

1. The specific reasons for denial;
2. Specific references to pertinent plan provisions;
3. A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and,

4. Information concerning the procedure the claimant must follow to obtain review of the denial.

Further, the PLAN must furnish an opportunity for a full and fair review of the claim, and Petitioner must be allowed to inspect all PLAN Documents and other papers with respect to his claim. An opportunity to submit issues and comments in writing is also required. All these protections must be afforded within a reasonable period of time. Petitioner charges Respondent flaunted these procedures.

Further, Respondents are charged with engaging in a pattern of conduct designed to interfere with the attainment of various ERISA and Plan rights proscribed by 29 U.S.C. § 1140 and 29 U.S.C. § 1141 and aforestated conduct also violates the fiduciary provisions of 29 U.S.C. § 1104, *et. seq.* On these facts Petitioner initiated this action.

Respondent DELTA moved this action be transferred pursuant to 28 U.S.C. § 1404(a) in December of 1976, and on March 31, 1977, the late Judge Joseph Waddy of the District Court for the District of Columbia granted DELTA motion and ordered the case transferred to United States District Court for the Northern District of Georgia, Atlanta Division.

After vigorous challenge without avail, to the United States Court of Appeals for the District of Columbia, both through mandamus and attempted appeal, averring that such a transfer offended the fiduciary provisions of ERISA and that the Atlanta forum was so pervasively dominated by Respondent DELTA, a fair judicial proceeding was impossible, Petitioner Pfister brought his cause by writ of certiorari to this Court in January of 1978 (No. 77-1078).

Relying before this Court upon Senior Circuit Judge Fahy's opinion of October 31, 1977 (Appendix T) that the District Court had abused his discretion in ordering the transfer, Pfister beseeched that he not be dispensed to the

Atlanta forum, as it would seriously endanger his ability to carry forward there the litigation. This Court was unmoved and the Petitioner was given his judicial ticket to the District Court for the Northern District of Georgia in Atlanta. In the summer of 1978, this action was assigned, to Respondent Newell Edenfield.

B. Post-transfer Proceedings (District Court Rulings)

The matter came before Respondent Edenfield in September of 1978, on Respondent Delta's motion to dismiss.

Respondents contended in their moving papers as follows. Notwithstanding how outrageous, malicious, vexatious, or heinous Respondent fiduciary misconduct is, it makes no difference under ERISA, since the statute does not authorize nor permit compensatory or punitive damages as a matter of law. Respondents further state the ERISA statute is the exclusive vehicle available to Petitioner and other PLAN beneficiaries to redress his injuries and since it is a remedial statute, a jury trial does not attach, and Petitioner claims for relief must be redressed through conventional equitable remedies not damages. Respondents further argued that ERISA's broad preemption provisions, 29 U.S.C. § 1144 (Appendix P) displaces all state laws and causes of action that otherwise would govern and control Respondents' misconduct, and that his federal fiduciary claim under ERISA did not support pendent jurisdiction over state causes of action. Presumably, Respondent Edenfield regards preemption sufficiently broad to preempt any common law causes of action based on the breech of Federal fiduciary duties.

The District Court Respondent Newell Edenfield ruled upon Respondent's motion to dismiss without providing the strongly urged oral argument requested by petitioner, and on December 21, 1978 rendered the subject order. (APPENDIX A). Respondent Edenfield held that ERISA's general remedial scheme does not support a claim for damages and that the language of 29 U.S.C. § 1132 and the statute's legislative

history evidence a clear intent to preclude damages of this sort. (APPENDIX A). Respondent Edenfield further disregarded petitioner's plea that punitive damages are essential to deter breaches of fiduciary duty and guarantee proper management of the Plans.

The District Court balked at its responsibility to fashion a rule of federal fiduciary care, crafted from substantive federal labor law, and effectively left the petitioner remediless for the wilfull and intentional breaches of fiduciary duties embodied under 29 U.S.C. § 1104, 29 U.S.C. § 1105 and 29 U.S.C. § 1106 owed to him by Respondent DELTA. The Respondent Court held Petitioner's additional tort claims for damages at common law in abeyance, pending further consideration.

The Petitioners claim for injunctive relief with respect to other plan participants was also dismissed by Respondent Edenfield. In summary petitioner's counts (II, III, IV) for damages, compensatory as well as punitive, growing from Respondent Delta's alleged wilfull and egregious breach of the fiduciary provisions 29 U.S.C. § 1104, 29 U.S.C. § 1105, and 29 U.S.C. § 1106 were dismissed.

On July 2, 1979, Respondent Edenfield, with petitioner common law counts for tort injury under submission since Feb. of 1979, dismissed (Appendix E,) petitioner's claim for intentional and negligent infliction of emotional distress (Count V), fraud, misrepresentation and deceit (Count VI) tortious interference with a fiduciary relationship (Count VII) and breach of the fiduciary duty to deal in good faith (Count VIII) (Appendix E) on the perception that these claims are ostensibly within the contemplation of the pre-emptive clause of ERISA, 29 U.S.C. § 1144. And if even petitioner could state a cognizable nonpreempted claim, Respondent Edenfield would not exercise his pendent jurisdiction over it, notwithstanding it followed as a consequence of injury to a federal right.

The practical effect of Respondent Edenfield's Dec. 21, 1978 order dismissing all claims for compensatory and punitive damages occasioned by Respondents' Delta willful violation of its fiduciary duties in combination with his refusal to exercise jurisdiction over the common law tort counts, judicially bludgeoned Pfister's prayer. Petitioner, was placed in an inferior legal position by Respondent Edenfield as a direct result of a statute, ERISA, designed to improve and foster beneficiary right and protect his benefit expectations.

On or about August 2, 1979, petitioner filed a motion pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455, on the basis that respondent Edenfield was disqualified from acting and proceeding further in the subject litigation, on account of extra-judicial factors derived outside of the litigation, and stemming in part from Respondent Edenfield's association, with Stuart Eizenstat, Chief Administration Adviser, exercising control over the United States Department of Labor, entrusted with enforcement and interpretative duties under ERISA.

Petitioner further stated that Mr. Eizenstat, in addition to having been Respondent Edenfield's Senior Law Clerk from 1968-1970 was also an associate partner in Respondent Delta's law firm of Powell, Goldstein, Frazer, Murphy of Atlanta, Georgia.

C. Post-Transfer Proceedings (Court of Appeal Rulings)

Petitioner filed separate notices of appeal from the final orders of the District Court, the subject of this petition. On July 6, 1979 the Respondent Court of Appeals (Appendix F) dismissed Petitioner appeal from the District Court's December 21, 1978 order without opinion.

On August 6, 1979, the Court of Appeals (Appendix G) recalled its mandate dismissing Petitioner's Appeal from Respondent Edenfield's December 21, 1978 order, allowing Petitioner 20 days' time within which to file a petition for rehearing of said dismissal (no. 79-1763).

Petitioner also processed his notice of appeal from Respondent Edenfield's order of July 2, 1979 dismissing all claims for damages accruing from Respondent DELTA's common law torts, where compensatory and punitive damages would attach. This later appeal No. 79-3207 was also dismissed by Respondent Court of Appeals by its order of November 5, 1979, (Appendix "I") also without opinion. A panel of Respondent Court of Appeals consisting of Circuit Judges Gee, Hatchett, and Henderson (formerly Chief Judge of United States District Court for Northern Division of Georgia, Atlanta Division, recently appointed Circuit Judge) issued said order.

Prior to Respondent Court of Appeals' dismissal of appeal No. 79-3207, Petitioner moved aforesaid Circuit Court for an order consolidating causes Nos. 79-1763 and 79-3207 because the appeals arose from common transactions, occurrences and like and had a common nucleus. Further, said orders, of December 21, 1978 and July 2, 1979, the subject of the respective appeals, when viewed in combination presented legal questions of substantial proportion which are *fundamental to the further conduct of the suit at bar and when considered collectively effectively conclude the litigation, and unresolved, cloud the litigation as they now do. Said motion to consolidate causes was denied summarily.*

Said motion to consolidate was summarily denied by Respondent Court of Appeals (Appendix I).

Respondent DELTA in response to PFISTER attempted appeal No. 79-3207 filed a motion to dismiss and a motion to hold Petitioner's counsel personally responsible for costs, on the novel theory that by seeking appellate review of patently false orders of Respondent Edenfield, Petitioner was committing a grievous transgression of procedure.

Petitioner's counsel filed a cross motion with the Respondent Circuit Court indicating that DELTA's motion for costs was spurious, and a ruse further designed and calculated to oppress the Petitioner, his counsel, a single practitioner, from prosecuting Petitioner's cause for redress against Respondent's spectacular show of fiduciary malfeasance; and in itself constitutes a violation of 29 U.S.C. § 1140, and 29 U.S.C. § 1141.

Although Petitioner also filed motions with the Court of Appeals prior to November 5, 1979 when said Court dismissed his appeal No. 79-3207 (Appendix I) Respondent Court of Appeals did not act upon said motions until November 13, 1979.

Petitioner moved to file an amended complaint and pleading in the Court of Appeals because of the disqualification of Respondent Edenfield moved on August 2, 1979. Said amendment sought relief restoring twenty-five (25) million dollars of Plan monies emaciated from the Respondent Plan, and otherwise lost by the imprudent and unreasonable decisions of Respondent DELTA in the management of the funds of said Plan, in derogation of their fiduciary duties under 29 U.S.C. § 1104, 29 U.S.C. § 1105, 29 U.S.C. § 1106; as well the removal of Respondent DELTA trustees from any further management of said Plan assets, together with the appointment of a successor trustee for the Respondent Plan appointed by the Respondent Court of Appeals to prevent further imprudent conduct; and an audit of said Plan carried out by the U.S. Department of Labor and Internal Revenue Service. Said amendment was summarily denied (Appendix J.)

Petitioner further sought to disqualify both legal counsel for Respondent DELTA—Vedder, Price, Kaufman, Kamholz & Day; and Powell, Goldstein, Frazer, & Murphy. The former firm's disqualification was sought for its vigorous lobby activities on behalf of the largest anti-ERISA institutional faction in Washington, e.g. ERIC, and because its senior partner, representing Respondent DELTA herein, was formerly General

Counsel for the National Labor Relations Board and Solicitor of Labor, raising further *propriety* question, because of the Labor Department's responsibilities in ERISA litigation of this type to assist in implementing the fiduciary provisions of the statute.

The latter law firm's disqualification was sought because its associate, David Garrett, III is the son of Respondent David Garrett, Jr., President of Respondent DELTA. Further said law firm represents both Respondent Garrett and Respondent Plan, whose interests are asymmetrical and adverse in this litigation. For instance, if Respondent DELTA were ordered to pay back $25 million of Plan losses to Respondent Plan, this would be a plus for Respondent Plan, but unacceptable to Respondent DELTA. Such dual representation violates the Canons of Ethics, that a single legal counsel cannot serve two competing interests. This motion was also summarily denied by Respondent Court of Appeals on November 13, 1979, (Appendix J.)

Petitioner further moved in early November 1979 for a stay of all further proceedings in both Respondent courts until Respondent Edenfield acted upon his disqualification and recusal lodged on August 2, 1979. This motion for stay was also denied summarily. (Appendix J.)

Said Respondent Court consisting of Judges Henderson, Gee, Hatchett, further ordered sua sponte that appellant opposition to Respondent DELTA motion to impose cost upon legal counsel and its petition for rehearing are stricken on the basis of impertinent and disrespectful references to Respondent Edenfield and Respondent DELTA and their legal counsel.

Petitioner filed a motion to have the Court of Appeals recuse itself and vacate its orders of November 5, 1979 and November 13, 1979, because of debilitating conflicts of interest between Respondent Henderson, Circuit Judge, and Respondent Edenfield, District Judge.

Aforesaid Circuit Judge Henderson was at the time of the subject litigation Chief Judge of the United States District Court for Northern District of Georgia, Atlanta Division, where the action is being prosecuted. Further, Respondent Henderson has close personal ties and alliances with both Respondent DELTA and Respondent Edenfield as would substantially color his judgment and preclude the impartiality which Petitioner expects and is entitled to receive from an appellate tribunal. It may well be that with the 26 individual DELTA executives-fiduciaries named, Respondent Henderson may have a statutory basis of disqualification as well. Said motion to recuse Respondent Court of Appeals was also summarily denied as was a petition for rehearing lodged with Chief Judge Brown of the Fifth Circuit. (Appendix K.) In compliance with the Respondent Court's order of December 5, 1979 Petitioner's counsel, a single practitioner, became duly certified to practice before the United States Court of Appeals for the Fifth Circuit.

D. Reassignment of Case

On December 18, 1979, Petitioner was notified by letter that both subject appeals No. 79-1763 and 79-3207 were dismissed and that the mandate, which was previously recalled, was reissued on December 18, 1979 (Appendix L.) On or about December 22, 1979 Petitioner received a notice dated December 21, 1979 from the District Court Clerk indicating the subject litigation was mysteriously reassigned by some unexplained force to Respondent Robert Hall. (Appendix M.) Simultaneous with aforesaid order of reassignment, Petitioner was advised that an order was filed December 19, 1979 by Respondent Edenfield denying Petitioner's motion for disqualification of Respondent Edenfield as moot since the case was transferred to Judge Hall. (Appendix N.) Petitioner has never received any response on the merits to his disqualification of Respondent Edenfield moved over 8 months previous.

Petitioner believes that Respondent Edenfield owes it not only to Petitioner but to himself to respond to Petitioner and the Court on the charges made by Petitioner in good faith to ensure fairness and impartiality in the conduct of Petitioner's trial.

Furthermore, while Respondent Edenfield has furtively withdrawn from proceeding any further herein, his orders of December 21, 1979 and July 2, 1979 remain prominently at the forefront of this litigation.

Petitioner asked that the Clerk of the Court of Appeals prepare and certify and index a copy of these proceedings (Appendix O) which was done on about January 18, 1980 in anticipation of these writs being filed. Said certified record is now in the possession of the Clerk of this Court consistent with Rule 31(2) of this Court.

Petitioner has filed a notice of appeal from Respondent Edenfield's denial of disqualification, and this Court may exercise its powers under Rule 20, as soon as this matter is docketed with the Respondent Court of Appeals should it choose to do so. Petitioner further advises that from August 2, 1979 thru December 19, 1979 Respondent District Court was infected with bias precluding action there, without risk and likelihood of waiver of disqualification or rehabilitation of Respondent Edenfield.

REASON FOR GRANTING WRITS

I

THE ISSUES HEREIN PRESENTED ARE OF EXCEPTIONAL CHARACTER AND PROFOUND NATIONAL SIGNIFICANCE WHICH DRAMATICALLY AFFECT THE WELL-BEING AND EXPECTATIONS OF MILLIONS OF PENSION PLAN BENEFICIARIES.

CONGRESS SPECIFICALLY INTENDED TO REDRESS FIDUCIARY BREACHES IN APPROPRIATE CASES THROUGH COMPENSATORY AND PUNITIVE DAMAGES AND THROUGH CREATION OF FEDERAL SUBSTANTIVE LAW.

The fiduciary provisions of ERISA extend to *all duties* of the Fiduciary with respect to a Plan,[1] not just investment decisions. This is significant in the case at bar where the Petitioner has alleged an intentional and grossly reckless breach of the fiduciary provisions and due process procedures mandated under ERISA and tortious intermeddling by Respondent DELTA in the independent administration and discharge of PLAN responsibilities. Petitioners' lawsuit is one circumscribed exclusively by the law of tort.

Emerging from the Legislative History is a commonly shared purpose of protecting plan beneficiaries and the U.S. Treasuries from the reaches of self-interested plan sponsors and fiduciaries who for too long were impervious to the needs and expectations of the plan beneficiaries. The entire Act is calculated towards the creation of fiduciary standards of care and rules of conduct which are to ensure that the exclusive best interests of the plan beneficiaries are reliably served by plan fiduciaries. Congress fully intended that a plan beneficiary, like petitioner, have available his full-range of legal and equitable

[1] Williams, "Prudent Man Rule of the Pension Reform Act of 1974". 31 *The Business Lawyer* 105. (October 1975).

remedies to redress violations of his rights under ERISA —including compensatory and punitive damages, which rights are as a matter of common law available to him.

ERISA was intended to enhance and improve the protections of plan beneficiaries and to tighten the rules regulating the conduct of those who have chosen to undertake the role of plan fiduciaries. ERISA was not intended to be warped in such a way, as by Respondent Edenfield, to shield or galvanize plan fiduciaries, from conduct that in the absence of ERISA would impose liability upon them.

A. *ERISA Expressly Provides for the Full-Range of Legal and Equitable Remedies.*

The Respondent Courts' obvious imperviousness to the findings and declaration of policy that were explicitly set forth by Congress in the ERISA Statute require that it be set forth in appropriate detail at the inception of this, as it is the starting point for any meaningful interpretation any court seeks to impose upon the ERISA Statute.

It is set forth again for the Court's convenience, and will hopefully stimulate thorough consideration as it sets forth controlling parameter with respect to what federal Courts have been charged to do by the Congress:

"Findings and Declaration of Policy

SEC. 2.(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; *that the continued well-being and security of millions of employees and their dependents are directly affected by these plans;* that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they

have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; *that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;* that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, *by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility,*

and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. 29 U.S.C. Section 1001." (emphasis added).

The Most Honorable William H. Webster, a former circuit justice, summarized best the special obligations imposed upon the judiciary and others vested with the responsibility of fulfilling the Statute when he stated:

> "I suggest you also keep in mind the statement of the Joint Committee Conference . . . *that the courts will construe these matters and interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of the employee benefit plan.*
>
> Section 404 requires that the fiduciary discharge his duties—his duties, not just his investment responsibilities—but his duties, and so we on the courts and everyone who is concerned with the enforcement of these sections, will take into account, I am sure, that special relationship, and because we must take it into account, you must likewise take it into account in making your plans.
>
> Pension plans and welfare plans are favored in the law. *They enjoy favorable tax treatment. . . .*
>
> *Because of this, I think there will be some strict looking at the rule of prudence. I am not so sure at all that we will just settle for old standards in this regard.* We will expect that fiduciaries be familiar with such matters, and I think that this, too, has a very salutary effect on the overall operation of pension and welfare plans. . . .
>
> Many of these companies are owned or controlled by small groups of interests who regard the funds that are placed in these funds as their funds and their money. In fact, in many cases, the funds were placed there as tax shelters, and not with some benevolent idea of helping employees along.

All this is going to change with the application of ERISA, it seems to me, and we will be relieved of many people in the kitchen who don't belong there."[2] (emphasis added)

Congress was well aware that in order to establish meaningful fiduciary standards under the ERISA Statute, it would be incumbent upon them to provide for mechanisms to allow vigorous enforcement of said provisions by private plan beneficiaries. If a Fiduciary could willfully violate the duties imposed upon him by the Congress without fear of rebuke other than to have to comply in the same degree and manner the law required of him initially, the fiduciary provisions would be rendered nugatory. The sentiment of the Committee to provide broad enforcement provisions is best manifest in the following statement taken directly from the Legislative History text:

> "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries *with broad remedies for redressing or preventing violations of the Retirement Income Security for Employees Act as well as the amendments made to the Welfare and Pension Plans Disclosure Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts* and *to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law* or recovery of benefits due to participants. For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court." (emphasis added)[3]

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[2] Webster, "Fiduciary Responsibility: Questions and Answers", 31 *The Business Lawyer* 129, 130 (October 1974).

[3] Legislative History of Employee Retirement Income Security Act of 1974, Vol. III, P. 4871.

Respondent Newell Edenfield's inability to reconcile this congressional statement of broad remedies for redressing violations and providing the full-range of legal and equitable remedies with its Order (Appendix A) that compensatory and punitive damages (traditional legal remedies) are not available can only be construed as a pernicious deficiency rendering his subject order of December 21, 1978 clearly infirmed. It is elemental jurisprudence that the "full-range of legal and equitable remedies" means precisely that. Semanticists beware!

While this language is sufficient in and of itself to include compensatory and punitive damages, Congress had the facility of language to expressly prohibit the availabilities of these remedies if it were, in fact, its intent to do so. Nowhere in the Legislative History, or in any of Respondents papers, is it shown where the Congress expressly stated fiduciary punitive or compensatory damages would not be available to redress wrong under the Statute. The more persuasive view is that the Legislative History and purposes of the Act are best achieved by the availability of this form of relief in an appropriate case, such as the instant one.

Respondent Edenfield's emphasis is inordinate with respect to the interests of employers being freed-up from additional costs resulting in discontinuation of plans. This is ruse rhetoric. Further, the Legislative History surrounding the enactment of ERISA indicates that Congress by virtue of compromise amendments in the Statute has legislated employer costs relief into the Act itself. Specifically, a number of congressional trade-offs designed to mitigate employer burdens are already enjoyed by the Respondent DELTA, and it is clear that Congress did not wish to predicate Plan improvement on relinquishing or moderating Plan protections.[4]

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[4] See *Senate Report No. 383*, 93rd Cong. 1st Sess. U.S. Code, Cong. & Ad. News 4904.

The Court's attention is directed to those portions of the Legislative History which indicate that the employer and plan sponsors were given more than adequate relief from any costs associated with ERISA by virtue of the rejection of the Bill provisions which called for immediate vesting and earlier eligibility standards.[5]

Clearly, the argument that plans are going to be discontinued if the spectre of punitive and compensatory damages exists under ERISA is hypothetical and unfounded. In the case at bar where an employer totally dominates the PLAN and exploits it for its own economic advantage, as much, if not more, than the interest of the beneficiary, and uses it as an instrument to defeat collective bargaining, I dare say that DELTA AIR LINES would cease to operate its PLAN. There is little doubt that the collective bargaining process would react most expeditiously to cover any such hiatus in employee benefits.

Moreover, the availability of compensatory and punitive damages provide no undue threat or apprehension to the plan fiduciaries who administer the main share of employee benefit plans. Indeed, no responsible plan administrator need worry as to the availability of punitive and compensatory damages, as these remedies would be available only in situations such as the one at bar where the fiduciary misconduct is so outrageous and unspeakable and so willful to prevent future abuses of a similar character, and to penalize the wrongdoers in a meaningful way from repeating that conduct.

Clearly, it was not the intent of Congress by virtue of the passage of the ERISA Statute to immunize outrageous conduct carried forth with with a total want of care by and which otherwise would subject the wrongdoer to sanctions under

[5] See *Senate Report No. 127,* 93rd Cong., 1st Sess., U.S. Code of Cong. & Ad. News 4855; *H. R. Rep. 807,* 93rd Cong., 2nd Sess., U.S. Code Cong. & Ad. News 4689.

common law to the full measure of compensatory and punitive damages. Such an interpretation would not only frustrate the purposes of the Statute, but would in large measure invalidate the entire ERISA mandate itself.

B. *The Fiduciary Duty Codified by ERISA*

The Legislative History of ERISA makes it abundantly clear that the actions arising under ERISA are to be regarded and treated in similar fashion to those brought under Section 301 of the Labor Management Relations Act of 1947. The History states as follows:

> "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947."[6]

29 U.S.C. Section 185 creates Federal substantive rights and requires development of appropriate Federal law applicable thereto. *International Union, et al. v. Hoosier Cardinal Corp.* 383 U.S. 696, 86 S.Ct. 1107 (1966).

Moreover, 29 U.S.C. Section 185 is substantive, and the laws to be applied pursuant to it are federal laws which must be fashioned from policies of our national labor laws. Congress under ERISA is telling the Court that just as the substantive law of 29 U.S.C. Section 185 should draw upon the policies of preexisting national labor laws, so too must ERISA be derived.

The doctrine of the duty of fair representation bears close functional similarity to the fiduciary Duties codified in ERISA, although the ERISA duties are statutorily stronger. It is urged that the Court weigh these duties when seeking to redress their breach. The duty of fair representation is contemplated within the purview of 29 U.S.C. Section 185, and has been duly

[6] H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2nd Sess. in 1974, U.S. Code Cong. & Ad. News, pp. 5038, 5107.

recognized by this Court commencing in *Steele v. Louisville & N. R. Company,* 323 U.S. 192, 65 S.Ct. 226 (1944). Although this tort was first propounded in the context of racial discrimination under the Railway Labor Act, the Supreme Court has extended its coverage to cases under Section 301 of the NLRA. *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953).

The aforesaid duty is tort in nature, and when breached, it will give rise to compensatory and punitive damages which "do not fall into a discretionary category, but may be recovered as of right." See *Minnis v. International Union United Auto., Aerospace, Etc.,* 531 F.2d 850, 852 (1975)

In *Bond v. Local Union 823, International Brotherhood of Teamsters, Etc. of America,* 521 F.2d. 5 (1975), the Honorable then Circuit Judge Webster stated that the duty of fair representation as codified and expounded by the Supreme Court in *Vaca v. Sipes,* 386 U.S. at 177, is a duty imposed by federal law. As the Court explained in *Griffin v. International & United Auto., et al.,* 469 F.2d. 181, 183 (1972), . . .

> "The Supreme Court did not invest the union with a carte blanche. It sought to fashion an appropriate standard by which to measure union conduct. 'The doctrine of Fair Representation includes a statutory duty to serve all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.' Citing *Vaca v. Sipes,* 386 U.S. at 177 . . . Each of these requirements represents a distinct and separate obligation, the breach of which constitutes the basis for civil action."

Up to this Court holding in *International Brotherhood of Electrical Workers v. Foust* No. 78-38 decided May 29, 1979, the prevailing view regarding the breach of the duty of fair representation could best be summarized by the holding of *Harrison v. United Transportation Union,* 530 F.2d 558 (1975), *cert. den.,* 425 U.S. 958 (1976).

The *Harrison* Court specifically rejected the Union's contention that the award of punitive damages should be stricken as not available to redress a breach of the duty of fair representation. The Court stated in appropriate language, as follows:

"'We must also reject the contention of UTU that the award of punitive damages should be stricken.

> All jurisdictions agree that the purposes of punitive damages are to vindicate the plaintiff, punish the wrongdoer, and set an example that the tortious conduct should not be repeated. . . . *Northwestern National Casualty Co. v. McNulty,* 307 F.2d 432, at 435 and 436 (5 Cir. 1962); *Adams v. Hunter,* 471 F.2d 648 (4 Cir. 1973). While compensatory damages may to some degree serve the same purposes, it is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be *de minimis. St. Clair v. Local No. 515,* 422 F.2d 128, 132 (6 Cir. 1969). *Unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation.* The situation is analogous to that present in civil rights actions where the plaintiff's rights are equally important and often equally difficult to enforce without the threat to defendants of liability for punitive damages in an aggravated case. Courts have held in civil rights suits that the "*federal common law of damages" is controlling and permits the recovery of exemplary or punitive damages, even in those cases where compensatory damages may be merely nominal. Basista v. Weir,* 340 F.2d 74, 87 (3 Cir. 1965)." (emphasis added). . . .[7]

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[7] *Harrison v. United Transp. Union,* 530 F.2d 558, 563 (1975). Cert. den. 425 U.S. 958, 96 S.Ct. 1737 (1976).

. . . The Ninth Circuit has held, however, that in a civil rights suit personal animosity is not "a prerequisite to instructing the jury as to punitive damages or to the granting of such damages." *Gill v. Manuel,* 488 F.2d 799, 801 (9 Cir. 1973). Again, analogizing the union's duty of fair representation to a constitutional duty, we hold that in the instant case proof of personal animosity or actual malice was not necessary.' "[8] (emphasis added).

When the Court reflects upon the characteristics of the duty of fair representation circumscribed above and measures against its backdrop the requirements of a plan fiduciary, it becomes profoundly clear the two duties are functionally close.

Finally, expanding the concept expressed by Chief Judge Haynesworth in *Harrison* that the duty of fair representation is similar to a civil right action where the petitioner's rights are as important and often as difficult to enforce without the existence of punitive damages in aggravated cases, petitioner respectfully commends the Court's attention to its holding in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1970).

The Honorable Justice Brennan stated for the majority as follows:

> "Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequence of its violation. But 'it is well-settled that where legal rights have been invaded and a federal statutue provides for a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done.' *Bell v. Hood,* 327 U.S. 684."

In Justice Harlan's concurring decision, he stated:

> "Where federally-protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies to grant the necessary relief . . .

[8] Id. at 563, 564.

> Thus in suits for damages based on violations of Federal statutes lacking an express authorization of a damage remedy, this court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964)."

Equally as instructive as the statement of legal principle that this Court has a capability recognized under the federal law to make available damage remedies for breaches of ERISA is Justice Brennan's rejection of the defendants' contention that Congress did not expressly provide for money damages. The court held, that since there was no explicit congressional declaration that a person aggrieved by a tortfeasor violating the Fourth Amendment "may *not* recover money damages . . . we hold that petitioner is entitled to recover money damages for *any injuries* he has suffered as a result of the violation . . ." (emphasis added). *Id.* at 397.

In the instant case, not only has Congress in its Legislative charge specifically authorized "broad remedies" as redress to an aggrieved Plan Beneficiary, but they have also expressly mandated the availability of "the full-range of legal and equitable remedies." The specific language of the within statute is sufficiently more supportive of an award of money damages than any noted by this Court in *Bivens.*

The onus is not upon Pfister to establish express statutory authorization for the recovery of compensatory and punitive damages, but rather the burden in accordance with Justice Brennan's decision in *Bivens* is upon Respondent to show that there is an explicit congressional prohibition that persons injured and aggrieved by willful and wanton acts undertaken by a fiduciary in derogation of his federal fiduciary duties is **not** to recover money damages. Respondents have not, and cannot, carry any such burden.

Conscientious review of all of the Legislative History of ERISA authorizing the full-range of legal and equitable remedies together with its admonition that ERISA emulate and incorporate the substantive features of national labor law contained in 29 U.S.C. Section 185, and the various judicial determinations at this Court level all strongly indicate that a Plan beneficiary, such as the Petitioner, is unquestionably entitled to pursue an award of compensatory and punitive damages, when he is the subject of conduct, outrageous and recklessly indifferent to his well-being and rights, as in the instant case.[9]

Of equal force in compelling this Court to vacate the subject orders holding that ERISA does not support an award of compensatory and punitive damages is the recognition that this is the only judicial remedy which is realistically appropriate to vindicate the personal interests protected by the ERISA statute.

Without meaningful sanctions to insure the substantive protections of ERISA, there will be no substantive protection. This Court should not be beguiled by Respondents who perceive no accountability under Federal law to their beneficiaries. Accordingly, immediate action is required by this Court

[9] A plan fiduciary must discharge his duties with respect to a plan solely in the interest of the plan participant and beneficiary. In discharging his duties, the Fiduciary must act "for the exclusive purpose of providing benefits to beneficiaries and defraying the reasonable expenses of administering the plan." He must conduct the affairs of the plan "with the care, skill, prudence and deligence under the circumstances then prevailing that a prudent man acting in like circumstances, capacity, and familiar with such matter would use in the conduct of an enterprise of like character and like aims." Further, he is required to diversify investments to minimize losses unless it is unwise to do so. Lastly, he must act "in accordance with the documents and instruments governing the plan to the extent that those documents are consistent with the requirements of the law." (Am. Jur. New Topic Service: Pension Reform Act).

to clarify the remedies available to a beneficiary injured by ruthless institutional machoism and fiduciary misconduct, lest there be a flourish of comparable judicial ambiguities.

II.

A COURT OF APPEALS CANNOT SANCTION DISTRICT COURT'S ERISA ABERRATIONS WHICH PLACE PETITIONER IN A WORSE POSITION AFTER ERISA'S ENACTMENT THAN HE WAS AT COMMON LAW, BEFORE ITS ADOPTION.

The practical effect of the District Court order of December 21, 1978 (Appendix A) and July 2, 1979 (Appendix E) if unchanged, is that ERISA is not an instrument to encourage protection of plan participant rights, but rather a mantle of immunity under which plan sponsors and fiduciaries can galvanize themselves from damage remedies to which they are otherwise susceptible in the absence of ERISA.

The District Court's position can be summarize as follows:

ERISA does not provide any compensatory or punitive damages even for egregious fiduciary breaches and is the exclusive remedy available to an aggrieved plan participant, having preempted all common tort laws, and done so at a minimal threshold of liability. Therefore, if a plan participant prior to ERISA were able to sue out a valid cause of action for emotional and mental distress or breach of the implied duty to deal in good faith or fraud under common law tort, the District Court contends ERISA preempts his right to do so, now, as well as his right to recover damages for said tort even though he sustains injury as a consequence of a breach of a federal duty. Neither Legislative History nor congressional intention support this fragile conclusion. The purpose of ERISA is to *strengthen* and *fortify* fiduciary conduct, not diminish and obscure it.

It is difficult to conceive how a District Court such as Respondent Edenfield, who being adequately assured by Petitioner that the common law counts recited by Petitioner are sufficient for the imposition of compensatory and punitive award for injuries Pfister sustained at the hands of Respondent DELTA, can hold the Respondent DELTA to a lesser standard under the express statutory provisions of ERISA. (29 USC § 1104, et seq.)

Without detailing the precise prima facie requirements of the torts recited by the Petitioner, it is enough to note that each of the counts stated by the Petitioner does sound a valid cause of action against Respondent DELTA at common law and, as such, would hold Respondent amenable in both compensatory and punitive damages. Common law fraud and misrepresentation, the intentional conflict of emotional distress, tortious interference with a fiduciary relationship and breach of the implied covenant of good faith and fair dealing, are all recognized torts sufficient in themselves to authorize compensatory and punitive damages. Recently on March 1, 1980 this Court in *Mutual of Omaha v. Egan* No. 79-1073 refused to grant certiorari and overturn the California Supreme Court's decision holding that a disability insurer who in bad faith terminates a disability recipient's benefits, as in the instant case, is subject to both compensatory and punitive damages for breach of the implied covenant of good faith and fair dealing.

The California Supreme Court observed that:

"As one commentary has noted, 'The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . **[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The**

obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust." (Goodman & Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court* (1974) 62 Cal.L.Rev. 309, 345-347.) **Furthermore, the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship.** (Hirsch et al., *Strict Liability: A Response to the Gruenberg-Silberg Conflict Regarding Insurance Litigation Awards* (1975) 7 SW U.L.Rev. 310, 326; Comment, *Egan v. Mutual of Omaha Insurance Co.: The Expanding Use of Punitive Damages in Breach of Insurance Contract Actions* (1978) 15 San Diego L.Rev. 287, 298-301; Note, *Contracting for Punitive Damages: Fletcher v. Western National Life Insurance Company* (1971) 4 Loyola L.A. L.Rev. 208, 219-224.)

Egan manifests vividly the impropriety of the Respondent's District Court's order the focus of this petition. If in the absence of ERISA, Respondent DELTA would be liable to Petitioner for compensatory and punitive damages, in accordance with Egan, how can a district court read ERISA in such a way as to eliminate that accountability. This Court can not abide such judicial chicanery.

Respondent Edenfield would have this Court believe that Respondent DELTA's assumption of a statutory fiduciary duty would result in a thinner accountability than that imposed by the common law.

Petitioner skepticism is fueled by a District Court's order which has rendered Pfister an inferior "legal person" than he was prior to the creation of a statute designed to create standards of conduct so that his exclusive best interests are mindfully served and his legal dignity enhanced. Petitioner needs no such judicial amicus.

In their present format the orders of the District Court having received Respondent Circuit Court's blessing are an affront to this Court and to our sacred profession.

III.

THE RELIEF SOUGHT HEREIN IS UNAVAILABLE IN ANY COURT, OTHER THAN THIS COURT, AND THE COURT OF APPEALS' REFUSAL TO EXERCISE ITS APPELLATE OR MANDAMUS JURISDICTION TO REVIEW THE SUBJECT ORDERS WHICH ARE FUNDAMENTAL TO FURTHER CONDUCT OF THE LAWSUIT IS IRREPARABLY INJURING THE FIDUCIARY RIGHT SOUGHT VINDICATED BY THE PETITIONER.

This Court can assure itself under *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, that there is sufficient legal footing for it to review now the substantial legal questions presented herein growing from an unheeded congressional command to the Respondent Courts to fashion a federal fiduciary standard and to ensure that standard with all appropriate remedies.

This Court in *United States v. General Motors Corp.*, 323 U.S. 373, and *Land v. Dollar*, 330 U.S. 731, reviewed a final court's finding in a case not yet tried because the ruling was "*fundamental to the further conduct of the case.*"

The factual similarities between *Gillespie* and the within case are striking as this Court stated in *Gillespie* "in *deciding* the *question* of *finality* the most *important* competing consideration

are the *inconvenience* and costs of piecemeal review on the one hand and danger of denying justice by delay on the other." . . . *And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in* having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them, cf. *Dickinson v. Petroleum Conversion Corp., supra,* certainly is ample reason to view their claims as severable in deciding the issue of finality.

If this Court does not now act to review the subject orders on the merits, not only will the fiduciary protection sought to be vindicated by Pfister be irreparably harmed, but he will be compelled to proceed with litigation whose legal predicate is fatally flawed. The harshness of the District Court's derelictions has been further amplified by Respondent Court of Appeals' adamant refusal to extend judicial care to Pfister citing judicial orderliness as an excuse. Petitioner, commends at last, what should properly—be acknowledged at first—the admonition of the Honorable Justice Learned Hand "Liberty lies in the hearts of men and women; when it dies there, no Constitution, no Law can save it."

CONCLUSION

For all the foregoing reasons, Petitioner prays this Court issue writs of prohibition, mandamus, and injunction, or one or more said writs, as this Court deems appropriate, directed to Newell Edenfield, District Judge, and to Robert Hall, District Judge, Respondents herein, restraining said Respondents from enforcing said orders of December 21, 1978 and July 2, 1979 and requiring Respondents to vacate said orders forthwith; and that further appropriate writs be directed to the Respondent Court of Appeal to review and vacate the orders rendered by it on July 3, 1979, November 5, 1979, November 13, 1979 and December 5, 1979, and Petitioner further prays that a common law writ of certiorari issue from this Court to the named Respondent Courts and that the issues presented herein be placed upon the docket of this Court for full briefing, argument and disposition on the merits with all deliberate speed, and that a stay of all proceedings preserving the status quo of the litigation be granted, until the issues presented are disposed of on the merits by this Court. Petitioner further prays for the costs of this document, advanced by counsel because of petitioner's poverty and for attorney fees and other costs incurred to vindicate his cause up to and before this Court authorized by statute, and for such other and further relief as this Court may deem just and equitable.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Eugene J. Carella, counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Common Law Writ of Certiorari and Writ of Mandamus and/or Prohibition and/or Injunction to District Court and Court of Appeals for the Fifth Circuit named herein is presented in good faith to fully protect the cause and rights of Petitioner and is not filed for purpose of delay.

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Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1451

FREDERICK B. PFISTER,

Petitioner

v.

HONORABLE NEWELL EDENFIELD
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al,

Respondents

MOTION FOR LEAVE TO FILE PETITION, AND PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

SEPARATE APPENDIX

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United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FREDERICK B. PFISTER vs. DELTA AIR LINES., et al.	CIVIL ACTION No. C78-1567A

ORDER

This suit by a former employee of Delta Air Lines, Inc. (Delta) charges twenty-six defendants[1] with violations of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq.* Originally filed in the United States District Court for the District of Columbia, the case was transferred to this district pursuant to 28 U.S.C.

[1] Plaintiff has named as defendants: Delta, the Delta Employee Benefit Plan (the Plan), consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; the Delta Administrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; Delta Administrative Committee members W.T. Beebe, D.C. Garrett, Jr., R. Oppenlander, J.R. Howell, H.T. Fincher, R.W. Allen, R.S. Maurer, T.M. Miller, Wm. E. Stephens, each in their individual capacities; the Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, individually; John Aduddell; J.J. Schneider; and Donald Baus (all of the above hereinafter collectively referred to as Delta defendants); Charles T. Bishop, Jr.; and the Brewer Adjustment Company.

§ 1404(a) on September 15, 1978.[2] It is now before the court on twenty-four defendants'[3] motion to strike and/or dismiss, request for costs and attorneys' fees, and request for an oral hearing. Rules 12(b)(6), 12(f), and 54(d), Fed.R.Civ.P.

Plaintiff contends that in 1973, while employed as a mechanic by Delta at its facilities at Washington National Airport in the state of Virginia and while a participant in the Delta employee disability, medical, and retirement benefit plan ("Plan"), he injured his back. On March 30, 1974, he allegedly reinjured his back but continued to work for Delta through June 30, 1974. Plaintiff charges that Delta had promised to provide him with "light work" following his injury in March, that it reneged on this promise and required heavy lifting, and that as a result he became totally disabled on June 30, 1974 and has continued so to the present. He further alleges that prior to his departure from Delta due to his disability, Delta, acting in concert with the Plan, sought to force plaintiff to quit his employment so that he would forfeit all Plan benefits. Plaintiff was certified as totally disabled by his physician on November 8, 1974, and, at some point, the Plan and Delta apparently acknowledged in a letter written by defendant Stephens that plaintiff was disabled and was entitled to total disability status through February 28, 1975. Plaintiff contends that defendants induced him to meet with defendant Bishop, an insurance adjuster, without benefit of counsel, by telling him they had already determined that he was totally disabled and wold receive all of his benefits. During that meeting plaintiff made a statement which has been interpreted by defendants as damaging to his disability claim. Following this interview, plaintiff alleges that the adjuster visited his physician. As a result, without any additional medical examination, his doctor revised his diagnosis and declared plaintiff eligible for "light duty work", and on March 1, 1975, the Plan

[2] The district court granted defendants' motion to transfer on March 31, 1977, but because plaintiff attempted a variety of appeals from that order, the case was not transferred to this district for a year and a half.

[3] All of the defendants except Brewer Adjustment Company and Charles T. Bishop, Jr. have joined in this motion.

arbitrarily rescinded his status of permanent disability and cancelled all employee benefits without an explanation for their conduct and without affording plaintiff an opportunity to be heard.[4] Plaintiff further asserts that he attempted to obtain copies of the benefit plans and other pertinent information from defendants but that defendants refused to provide him with the same until after this suit was filed and that he therefore was unable to convert his insurance or to appeal the decision regarding his disability. In an eight-count complaint, he now seeks disability and retirement benefits, cumulative damages and penalties in excess of $48,000,000, and a permanent injunction against the defendants.

Defendants have moved to strike or dismiss certain of plaintiff's prayers for relief in Count I, certain statements included in plaintiff's allegations in Count I, plaintiff's claims in Counts II through VIII for compensatory and punitive damages, and plaintiff's request for a trial by jury. Plaintiff has opposed this motion,[5] and, as noted earlier, both sides have requested oral argument of this matter. The court declines to hear oral argument on these issues, noting for the benefit of plaintiff's counsel, who strenuously asserted his right to such argument, that Rule 78, Fed.R.Civ.P., states: "To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing

[4] There is some indication in plaintiff's brief that he was unaware of the reasons for the termination of his benefits until approximately July 16, 1975 when defendant Stephens, in a letter responding to an inquiry by plaintiff's congressman, Herbert C. Harris, II, stated that plaintiff had been denied long-term disability benefits because his doctor had certified that the plaintiff was able to perform "light work" on March 1, 1975.

[5] The court notes that plaintiff's counsel is from Los Angeles, California and does not maintain an office in this district. Although he has not sought leave to appear *pro hac vice*, Local rule 71.4, the court will grant him permission to so appear. Counsel is cautioned to familiarize himself with the local rules of this court, however.

upon brief written statements of reasons in support and opposition." The Local Rules of this court include such a provision,[6] and the court sees no need to deviate from its practice in this case.

Count I of the complaint alleges deprivation of benefits to which plaintiff was entitled pursuant to the Plan and seeks recovery of those benefits or a lump sum payment of $500,000. This claim is based upon 29 U.S.C. § 1132(a)(1)(B), which authorizes a plan participant to bring a civil action "to recover benefits due him under the terms of his plan ...." Both parties apparently agree that under the Plan plaintiff's right to continued benefits after March 1, 1975 depended upon either his continued employment with Delta after that date or the continuation of his totally and permanently disabled status. Defendants now seek dismissal of the prayer for benefits on the ground that plaintiff was not in Delta's employ on the critical date—a fact which he does not dispute—and that he was not then and is not now permanently disabled. Defendants' latter assertion seemingly derives from plaintiff's allegation that although defendants determined, "without further medical examination, that Plaintiff could perform 'light work', [they have] failed to proffer any work of any type whatsoever to Plaintiff up to the present," Complaint, Count I, ¶ 21, and that this failure to provide such work demonstrates defendants' intent to deprive plaintiff of his benefits. Complaint, Count I, ¶ 34. They argue that since plaintiff "seeks" light work he cannot have been or now be totally disabled and therefore, as a matter of law, is not entitled to benefits under the Plan.

The court declines to read plaintiff's allegation in this fashion, particularly in light of other charges contained in the complaint. Paragraph 14 of Count I alleges that "as a result of Plaintiff's conscientious efforts to carry out his duties as a Delta mechanic, his injuries were substantially aggravated, rendering

[6] Local Rule 91.3 provides, "All motions shall be decided by the Court without oral hearing unless otherwise ordered by the Court."

him totally and permanently disabled." Nowhere does plaintiff state that he is no longer totally disabled, and the court cannot infer this fact from the allegations relating to light work. A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 (1957). Since plaintiff may be able to prove at trial his complete disability, and thus his entitlement to benefits, the court DENIES defendants' motion on this point.[7]

Defendants have also moved to dismiss plaintiff's prayer for injunctive relief in Count I insofar as it seeks to enjoin them from future discrimination against other Plan participants. They note that this suit is not brought on behalf of a class and therefore that such relief is without basis. As plaintiff has offered no opposition on this point, the court hereby DISMISSES this prayer for injunctive relief.

Defendants next argue that plaintiff's claim against the plan administrator for civil penalties of $100 per day should be dismissed. This claim is based upon 29 U.S.C. § 1132(c), which states:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be

[7] In opposition to defendants' motion, plaintiff has also argued that he is entitled to benefits because Delta was under an obligation to provide him with "light work" and that if it had fulfilled its duty in this regard he would still be a Delta employee and would be covered by the Plan. The court finds no support under ERISA or any other law for such a position.

> personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal and the court may in its discretion order such other relief as it deems proper.

Under 29 U.S.C. § 1024(b)(4), the administrator, upon written request of any participant or beneficiary, is required to furnish "a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." Plaintiff alleges that he requested in writing from the plan administrator but did not receive "the Plan text, the appeal procedures, and general information concerning his rights as a Plan participant."[8] Complaint, Count I, ¶ 12.

Defendants seek dismissal of this claim, noting that the requirement in section 1024(b)(4) that administrators supply a copy of the latest summary plan description and plan description to participants upon request was not in effect at the time of the alleged violation, having been suspended by Department of Labor regulations until May 30, 1976, and then again until July 15, 1977.[9] They argue therefore that plaintiff's claim for $100 a day penalties is inappropriate as a matter of law.

Plaintiff counters that although the Secretary of Labor deferred the requirement pertaining to production of certain documents a similar provision contained in ERISA's predecessor statute, the Welfare and Pension Plans Disclosure Act, authorized penalties of $50 per day for an administrator's failure to provide certain documents to a plan participant. His argument continues that by virtue of 29 U.S.C. § 1032 this prior penalty provision is still in force. Section 1032(a)(1) provides, "The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and

[8] It appears that plaintiff did receive these materials on or about December 16, 1976, after the filing of this suit.

[9] 29 C.F.R. §§ 2520.104-2, -4 (1977).

events which occurred before the effective date of this part." Plaintiff interprets this section to mean that no provision of the old Act was deemed repealed until its replacement section had become effective. Therefore, although the effective date of section 1024(b)(4) was postponed, the former $50 per day penalty provision necessarily governed the administrator's conduct.

The court cannot resolve the propriety of this penalty claim at this juncture for two reasons. First, it is unclear precisely which documents plaintiff requested in writing from defendant administrator. Plaintiff's allegation on this point is not specific, and it is possible, although unlikely, that he requested copies of documents other than the plan description and summary plan description. If he sought other documents required by section 1024 to be furnished to plan participants, the deferral regulation would have no impact since it excused production of the summary plan descriptions and plan descriptions only; the administrator would still be liable for failure to supply the other covered material. *See Pollock v. Castrovinci, et al.*, No. 78-2071 (S.D.N.Y., Aug. 14, 1978) order denying summary judgment; *see generally Hastings v. Merrill Lynch, Pierce, Fenner & Smith, et al.*, No. 7-70025 (E.D. Mich., Dec. 22, 1977) (order granting in part and denying in part summary judgment).

The second reason that the court cannot conclude this controversy is that neither side has provided it with sufficient information to determine the applicability of the deferral provision. The Secretary's regulation postponed the effective date of certain portions of section 1024(b)(4) only for welfare and pension plans which became subject to part 1 of ERISA prior to January 31, 1976. Thus, this regulation may not have applied to Delta at all.[10] For all of the foregoing reasons,

[10] Twenty-nine U.S.C. § 1031(b)(2) and any regulations pursuant thereto may also have some bearing on this case.

defendants' motion to dismiss the claim for a $100 per day penalty is DENIED.[11]

Defendants have also moved to strike certain allegations contained in Count I of the complaint pursuant to Rule 12(f), Fed.R.Civ.P. That rule authorizes the court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike, however, are not favored and material will not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation. 2A *Moore's Federal Practice,* ¶ 13.21[2], at 2429 (2d ed. 1975). The court has carefully reviewed the allegations in question, and while they appear to be irrelevant, it is unlikely that defendants will be prejudiced by their presence. Accordingly, the motion is DENIED on this point.

In Counts II through VIII of the complaint, plaintiff requests compensatory and punitive damages totaling $48,000,000. Noting that plaintiff has based his complaint solely upon violations of ERISA, defendants now seek dismissal of these counts on the ground that ERISA's general remedial scheme does not support a claim for such damages. They argue that the language of the civil enforcement provision, 29 U.S.C. § 1132, and the statute's legislative history evidence a clear intent to preclude damages of this sort. In addition, they point

[11] Defendants also requested that the court exercise its discretion and dismiss plaintiff's claim because plaintiff has now received the material and has not shown that he was harmed by the delay and because if the administrator failed to respond to plaintiff's demand the failure stemmed from matters reasonable beyond his control and thus was permitted by section 1024(b)(4). To exercise the court's discretion on these grounds at this stage of the proceedings would be premature. It is not clear that plaintiff need show harm during the delay, and certainly, he would not be required to present such factual issues in response to a motion to dismiss. Further, whether the administrator's failure was due to "matters reasonable beyond his control" is a question of fact to be developed at trial.

out that punitive and compensatory relief has not customarily been awarded under analogous statutes. For the reasons set forth below, the court concludes that defendants are correct.

Section 1132 provides that a civil action may be brought

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Nowhere in this section does the word "damage" appear. Instead, each subsection either identifies the precise form of relief available to a plaintiff under that provision, *e.g.*, recovery

of benefits, ties the relief authorized to a specific provision of ERISA, *e.g.*, a penalty for filing or document deficiencies or recovery of profits in the event of a breach of fiduciary duty, or refers to "other appropriate equitable relief." Plaintiff's suit must necessarily be based upon subsections (a)(1) and (3). The latter provision by its own terms permits only equitable relief and thus does not encompass compensatory or punitive damages; the former, while describing a monetary recovery, leaves no suggestion that anything other than the amount due to a participant under the terms of the plan will accorded to him.

That Congress did not intend to authorize awards of additional monetary relief is made clear by a review of portions of the voluminous legislative history of this Act. ERISA was enacted to establish safeguards and standards which would protect and support the pension and benefit expectations of employees so that workers who had been employed for years would not discover upon retirement that the pension benefits upon which they planned to live were not forthcoming. Its purpose was not to punish pension fiduciaries, administrators, or employers but to insure the delivery of earned benefits. Since the pension and employee plan benefit system is a voluntary one in that employers may decline to provide such benefits, Congress was concerned that in legislating to protect employee rights under these programs, it not burden employers with additional costs and requirements so that they discontinued these plans. The House Committee on Education and Labor stated:

> The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the private retirement system which limit the effectiveness of the system in providing retirement income security. The primary purpose of the bill is the protection of individual pension rights, but the Committee has been constrained to recognize the voluntary nature of private retirement plans.

> The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant.

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News, 4639. Senator Nelson expanded upon this notion during the floor debate on the Conference Report:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

Legislative History of the Employee Retirement Income Security Act of 1974, 4800 (3 volumes, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, April, 1976). This concern over increased costs and the harmful effect they might have on the continuation of existing plans and the instigation of new ones explains the careful choice of language in section 1132, in specifically providing for injunctive relief and the recovery of benefits and certain penalties and thus precluding compensatory and punitive damages.

Plaintiff has pointed to nothing in the legislative history which undercuts this conclusion. The statement in the Senate report to the effect that the Act is intended to provide "legal and equitable remedies," S.Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Admin. News 4871, does not demonstrate, as plaintiff urges, the propriety of general and punitive damages. Instead, it suggests that the committee considered the recovery of benefits or the clarification of rights as legal remedies. Plaintiff's contention that punitive damages are essential to deter breaches of fiduciary duty and to guarantee proper management of the funds is also devoid of merit. ERISA includes a strong deterrent to such conduct in the form of criminal sanctions. Twenty-nine U.S.C. § 1131 provides:

> Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

Finally, the court concludes that its holding that neither punitive nor compensatory damages is available under ERISA is consistent with judicial interpretation of analogous statutes. Such relief has generally been denied under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), the Equal Pay Act, 29 U.S.C. § 206(d), *Kumbalek v. I. Bahcall Industries, Inc.*, 6 FEP Cas. 1269 (E.D. Wis. 1974), and the National Labor Relations Act, 29 U.S.C. §§150, *et seq., International Union, UAA & AIW v. Russell*, 356 U.S. 634 (1958). Plaintiff's citations to cases brought pursuant to the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-412, in which

punitive and compensatory damages have been awarded are inapposite since section 412, the remedial provision, authorizes suits to obtain "such relief (including injunctions) as may be appropriate" and thus clearly permits awards of damages. Plaintiff's attempted analogy to certain provisions of the Labor Management Relations Act, 29 U.S.C. §§ 141, *et seq.*, meets a similar fate. The remedial language of both sections 185 ("money judgment") and 187 ("damages") differs significantly from that contained in ERISA's enforcement provision. Accordingly, this court concludes that neither compensatory nor punitive damages are available in actions brought pursuant to ERISA. *See Hurn v. Retirement Fund Trust*, 424 F.Supp. 80 (C.D. Cal. 1976); *Bell v. Southern Log Scaling & Grading Bureau*, No. 76-431 (D. Ore., Aug. 5, 1976).

While this result requires the court to dismiss Counts II, III and IV, plaintiff contends that Counts V through VIII are still properly before the court. According to plaintiff, these counts set forth causes of action for fraud, misrepresentation and deceit, intentional and negligent infliction of emotional distress, breach of duty to deal in good faith, and tortious interference with the fiduciary relationship. Plaintiff's Supplemental Opposition, at 28. His principal argument for the vitality of these counts appears to be that under ERISA these torts must be recognized as a part of the federal common law. The court declines this invitation to so extend the law, however. Noting that plaintiff has not alleged the existence of pendant jurisdiction for these claims or identified the state law on which they might be based, defendants have moved to dismiss these four counts on the grounds that the court should not exercise its pendant jurisdiction over these claims or, alternatively, that ERISA preempts all state tort claims relating to pension and welfare benefits. Since plaintiff has not seriously considered these issues in his briefs, the court will DEFER decision on the dismissal of Counts V through VIII and GRANT plaintiff an additional twenty (20) days in which to submit a supplemental brief on these topics. Defendants may then submit a reply brief within twenty (20) days of receipt of plaintiff's memorandum.

The last major question to be resolved is whether or not plaintiff's demand for a trial by jury should be stricken. Defendants argue that plaintiff's suit seeks only equitable relief and thus that a jury trial would be inappropriate. They claim that just as "back pay" has been held to be restitution and thus equitable relief in Title VII actions so that jury trials have not been required, *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975), plaintiff's claim for benefits—which appears to be the critical claim in this lawsuit—must be considered equitable. The court disagrees.

While it is true that a monetary remedy need not necessarily be a legal remedy, whether it is to be considered legal or equitable is determined by interpretation of the remedial statute as a whole. Any pertinent legislative history will, of course, assist in this determination.

In Title VII, to which defendants analogize, the remedial provision, 42 U.S.C. § 2000e-5(g), states:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief* as the court deems appropriate.

(Emphasis added.) Thus it is clear that back pay, in this context, is "other equitable relief", and a trial by the court sitting without a jury is therefore proper.

The remedial provision of the Age Discrimination in Employment Act, on the other hand, states that its provisions shall be enforced in accordance with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, and that "amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation" under the FLSA. 29 U.S.C. § 626(b). A court

is also authorized to give "such legal or equitable relief as may be appropriate." *Id.* Relying upon the stated connection between the FLSA, which permitted jury trials, and the ADEA and the reference to *legal* relief, the Supreme court concluded that under the ADEA a jury trial was required upon timely demand. *Lorillard v. Pons*, 434 U.S. 575 (1978).

The provision at issue in the instant action falls between these two extremes and presents a much closer question. As noted earlier, it states in part:[12]

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the term of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary—
>
> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The structure of this section was considered in *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F.Supp. 745, 747 (E.D. Mich. 1977):

> The section sets forth, in the alternative, two remedies which are available to the beneficiary. Subsection (a)(3) clearly and specifically creates a civil action for equitable

[12] *See* text at pp. 8-9, *supra*, for entire statute.

> relief. Subsection (a)(1)(B) creates a different civil action for legal relief. This follows the general rule of statutory construction that statutes should be construed in such a way as to render none of the subsections superfluous. If the court construed subsection (a)(1)(B) to also create a cause of action for equitable relief, it would be superfluous to subsection (a)(3).

This court now concludes that the *Stamps* approach presents the proper construction of this statute.

That the monetary benefits envisioned by subsection (a)(1)(B) are to be considered legal relief is supported by at least two portions of ERISA's legislative history. First, the Joint Conference Report states that actions pursuant to this section "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Admin. News, 5038, 5107. Suits of that nature are customarily tried to a jury. *Steele v. Brewery Workers Local 116,* 432 F.Supp. 369 (N.D. Ind. 1977). Second, as mentioned earlier, the Senate report referred to "legal and equitable remedies" available under ERISA. This reference to "legal" must have been made with the recovery of monetary benefits in mind. Accordingly, the court concludes that plaintiff has stated a claim for legal relief and is therefore entitled to a jury trial. Defendants' motion to the contrary is DENIED.

Finally, the court DENIES defendants' request for costs and attorneys' fees in connection with this motion.

In sum, defendants' motion to dismiss or to strike is GRANTED in part and DENIED in part, their request for costs and attorneys' fees is DENIED, and the request for oral argument is also DENIED. Plaintiff is DIRECTED to submit a supplemental brief within twenty (20) days and defendants are

DIRECTED to file their response, if any, within twenty (20) days of receipt of plaintiff's brief. The clerk is DIRECTED to resubmit this case in forty (40) days.

So ORDERED, this 20th day of December, 1978.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

APPENDIX B

In The United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

FREDERICK B. PFISTER, *Plaintiff,* vs. DELTA AIR LINES, INC., CHARLES T. BISHOP, JR., BREWER ADJUSTMENT COMPANY, et al., *Defendants.*	CIVIL ACTION No. C78-1567A

ORDER

The within and foregoing Motion of Gorman and Canfield and Austin F. Canfield, Jr. as present attorneys of record for defendant Brewer Adjustment Company, the sole proprietorship of Joseph H. Brewer, now deceased, and defendant Charles T. Bishop, Jr. having been read and considered and it appearing to the Court that due notice of said request of such attorneys and of this Motion having been given to defendant Charles T. Bishop, Jr. and Mrs. Dorothy Bishop Brewer, the Executrix and personal representative of Joseph H. Brewer, deceased, and their being no objection to such Request and Motion,

IT IS HEREBY ORDERED and adjudged that the firm of Gorman and Canfiled, and Austin F. Canfield, Jr. be and hereby are withdrawn as attorneys of record for defendants Charles T. Bishop, Jr. and Brewer Adjustment Company and

Joseph H. Brewer, deceased, and his personal representative, Mrs. Dorothy Bishop Brewer, and, as moved, that the law firm of Hansell, Post, Brandon & Dorsey and its partners and associates are hereby acknowledged as attorneys of record for said defendants and the clerk of this Court is directed to make such changes on the docket and other papers to evidence such substitutions of attorneys.

This 26th day of December, 1978.

NEWELL EDENFIELD

Judge, U.S. District Court
Northern District of Georgia
Atlanta Division

APPENDIX C

EXHIBIT B

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FREDERICK B. PFISTER vs DELTA AIR LINES, INC., et al	CIVIL ACTION No. C78-1567A

ORDER TO FORWARD COPIES

It appearing to the Court that a notice of appeal has been filed by Frederick B. Pfister, plaintiff from the order of December 21, 1978, and it further appearing that this case is still pending.

IT IS ORDERED that the Clerk forward copies of the pleadings to the United States Court of Appeal in lieu of the originals.

This 16th day of February, 1979.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

APPENDIX D

United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

FREDERICK B. PFISTER, *Plaintiff,* vs. DELTA AIR LINES, INC., et al. *Defendants.*	CIVIL ACTION No. C78-1567A

ORDER

The foregoing Motion of the Plaintiff, FREDERICK B. PFISTER, requesting substitution of MRS. DOROTHY BISHOP BREWER, the Executrix of the Estate of JOSEPH H. BREWER, now deceased, sole owner and proprietor of named Defendant BREWER ADJUSTMENT COMPANY and providing for the continuance of the within action against said substituted Executrix as a personal representative of aforesaid deceased, JOSEPH H. BREWER, sole owner and proprietor of BREWER ADJUSTMENT COMPANY, having been duly read and considered and proper notice afforded all parties of record in the within proceeding,

IT IS HEREBY ORDERED AND ADJUDGED that the Motion of the Plaintiff, FREDERICK B. PFISTER, substituting MRS. DOROTHY BISHOP BREWER, the Executrix of the Estate of JOSEPH H. BREWER, the sole owner and proprietor of BREWER ADJUSTMENT COMPANY, the named Defendant herein, be forthwith granted and entered by the Clerk of this Court.

IT IS FURTHER ORDERED hereby that the within action be further continued and prosecuted against BREWER ADJUSTMENT COMPANY by and in the name of the aforesaid Executrix MRS. DOROTHY BISHOP BREWER; and that all processes duly invoked by this Court shall bind and otherwise obligate her as the Executrix of the Estate of JOSEPH H. BREWER, sole owner of BREWER ADJUSTMENT COMPANY, and

IT IS FURTHER ORDERED that the estate of JOSEPH HUGH BREWER, Decedent, identified as Estate No. 106-196 in the Probate Court in and for the County of Fulton, State of Georgia, remain open; and said Probate proceedings stayed until the claim of the Plaintiff against said Estate of JOSEPH H. BREWER as embodied in the Complaint herein as finally and properly discharged to the satisfaction of the Plaintiff.

SO ORDERED this 27th day of June, 1979.

NEWELL EDENFIELD

Judge, U.S. District Court
Northern District of Georgia
Atlanta Division

APPENDIX E

United States District Court

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

FREDERICK B. PFISTER	CIVIL ACTION
vs.	
DELTA AIR LINES, INC. et al.	No. C78-1567A

ORDER

This is a civil action involving alleged violations of the Employment Retirement Income Security Act of 1974 (ERISA), 29 29 U.S.C. §§ 1001, *et seq.*, by twenty-six defendants.[1] It is now before the court pursuant to the court's order of December 20, 1978 and plaintiff's request for reconsideration of that order. A brief review of the facts is appropriate.

[1] Plaintiff has named as defendants: Delta, the Delta Employee Benefit Plan, consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; the Delta Administrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; Delta Administrative Committee members W.T. Beebe, D.C. Garrett, Jr., R. Oppenlander, J.R. Howell, H.T. Fincher, R.W. Allen, R.S. Maurer, T.M. Miller, Wm. E. Stephens, each in their individual capacities; the Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, individually; John Aduddell; J.J. Schneider; and Donald Baus (all of the above hereinafter collectively referred to as "Delta defendants"); Charles T. Bishop, Jr.; and the Brewer Adjustment Company.

Plaintiff asserts that in 1973, while employed as a mechanic by Delta at its Washington National Airport facilities and while a participant in the Delta employee disability, medical, and retirement benefit plan ("Plan"), he injured his back. He further contends that he reinjured his back on March 30, 1974 but that despite this injury he continued to work for Delta through June 30, 1974. Plaintiff states that following his second injury Delta promised to provide him with "light work" in the future. Contrary to this agreement, however, Delta allegedly continued to assign plaintiff to tasks requiring heavy lifting, which resulted in his total disability from June 30, 1974 to the present. Plaintiff further charges that during the March-June 1974 period, Delta, acting in concert with the Plan, sought to force plaintiff to quit his employment so that he would forfeit all plan benefits. In addition, certain of the defendants are said to have induced plaintiff to meet with defendant Bishop, an insurance adjuster employed by defendant Brewer Adjustment Company, in the absence of counsel, by telling him he had already been determined to be totally disabled[2] and would receive all his benefits under the Plan. Plaintiff contends that he made a statement during this interview which defendants have interpreted as being damaging to his disability claim and that as a result of this comment defendant Bishop met with plaintiff's physician and prevailed upon him to revise his diagnosis and declate plaintiff eligible for light duty work. On March 1, 1975, the Plan allegedly rescinded plaintiff's permanent disability status and canceled all his emplyee benefits without providing any reasons for such action and without affording plaintiff an opportunity to be heard. Plaintiff also asserts that after this arbitrary action, he attempted to obtain copies of the benefit plans and other pertinent information but

[2] On November 8, 1974, a physican certified plaintiff as totally disabled, and sometime thereafter, Delta and the Plan appear to have acknowledged his disability and granted him disability status through February 28, 1975.

that defendants refused to provide him with the same until after this suit was filed, thus preventing him from either converting his insurance or appealing the decision regarding his disability.

Claiming that he was inappropriately denied Plan benefits and that he has suffered great physical and emotional harm because of defendants' activities, plaintiff filed the instant action seeking disability and retirement benefits, compensatory and punitive damages in excess of $48,000,000, injunctive relief, a $100 per day penalty for failure to provide him with Plan information, and attorneys' fees.[3] By order dated December 20, 1978, in response to a motion submitted by all but two of defendants,[4] the court dismissed various aspects of plaintiff's eight-count complaint. Counts II through IV, which sought compensatory and punitive damages from defendants, were dismissed when the court determined that ERISA's general remedial scheme does not support claims for such relief. In addition, the court dismissed the prayer for injunctive relief set forth in Count I to the extent that it sought to enjoin defendants from future discrimination against Plan participants other than plaintiff on the ground that this suit had not been brought on behalf of a class.[5] Noting that plaintiff had not considered defendants' preemption or pendent jurisdiction arguments in support of their motion to dismiss Counts V through VIII, which allegedly set forth state law tort claims for compensatory and punitive damages, however, the court deferred a decision on this portion of the motion. Plaintiff was granted an additional period of time within which to submit a supplemental brief on the issues raised by defendants, and defendants

[3] This action was originally filed in the United States District Court for the District of Columbia and was transferred to this district pursuant to 28 U.S.C. § 1404(a) on September 15, 1978.

[4] Defendants Brewer Adjustment Company and Charles T. Bishop, Jr. did not join in this motion.

[5] Plaintiff suggests that the court actually dismissed his entire request for injunctive relief. This is clearly an incorrect interpretation of the decision. *See* Order of December 18, 1978, at 5.

were permitted an additional period of time in which to file a reply brief. Plaintiff has now submitted to the court two documents, styled "Plaintiff's Motion for Reconsideration" and "Memorandum of Points and Authorities in Support of Country Ordered Reconsideration," which apparently include whatever reply he proposes to make to defendants' contentions regarding the tort counts, and defendants have responded.

Plaintiff's motion for reconsideration focuses primarily upon the court's determination that compensatory and punitive damages are not available as remedies for violations of ERISA and its consequent dismissal of Counts II through IV.[6] Although plaintiff has presented no new arguments or authority in support of his position that such damages were intended under the statute, the court has carefully reviewed the question and concludes that its earlier decision was correct. Compensatory and punitive damages are not authorized under the precise and detailed statutory language of ERISA, and, given this statutory structure, the court sees no basis for constructing a new set of remedies. It therefore declines to alter its order and DENIES plaintiff's motion for reconsideration.

The court must next consider that portion of defendants' motion—which had previously been deferred—requesting that Counts V through VIII of the complaint be dismissed. These counts seek compensatory and punitive damages for torts allegedly committed by defendants in the course of denying plaintiff his employee benefits. According to plaintiff, they set forth causes of action for the intentional and negligent infliction of emotional distress (Count V), fraud, misrepresentation, and deceit (Count VI), tortious interference with the attorney-client relationship (Count VII), and breach of the fiduciary duty to deal in good faith (Count VIII). Defendants contend that

[6] Plaintiff also takes issue with certain portions of the statement of facts contained in the December order. Since the facts in question had no bearing on the substantive rulings in that order, the court need not resolve these objections.

these counts are subject to dismissal because plaintiff's complaint specifically states that his claims arise only under ERISA and such claims are not cognizable under that statute, because ERISA preempts all state tort claims, and because even if such claims are not preempted, the court should not exercise its pendent jurisdiction over these counts.

Paragraph 1 of Count I of the complaint sets forth the specific legal bases for this lawsuit, and this paragraph is incorporated into all other counts of that document. Since this paragraph refers only to ERISA, and presents no other ground for relief, defendants assert that these counts seeking compensatory and punitive damages should be dismissed as were Counts II through IV.

Although defendants' statement of the jurisdictional bases asserted in the original complaint is correct, plaintiff's response reveals his belief that he has invoked the court's pendent jurisdiction to assert state tort claims.[7] He notes that his "Answer to Defendants' Motion to Dismiss" filed in February, 1977, refers to the court's pendent jurisdiction over these counts, and, in addition, he relies upon a "Supplemental Complaint" from November, 1978 which he indicates corrected the oversight in the earlier complaint. While the official file and docket do not reflect the filing of such a supplemental complaint, the court concludes that since plaintiff has evidenced his intent to invoke the court's pendent jurisdiction and can easily remedy his failure to do so in his complaint, dismissal of Counts V through VIII on this technical point would be inappropriate.

[7] The court initially understood—perhaps incorrectly—plaintiff to be arguing that the torts alledged in these counts must be recognized as part of the federal common law under ERISA. It declined to so extend the law, however. *See* Order of December 18, 1978, at 13.

Defendants next contend that these tort counts must fail because ERISA preempts state tort claims of this nature. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

State laws are defined as "all laws, decisions, rules, regulations or other state action having the effect of law," 29 U.S.C. § 1144(c), as indicated, subsection (b) of this statute carves a narrow area in which state laws may continue to operate. Those state laws not preempted are ones "regulating insurance, banking, or securities" and "any generally applicable criminal laws." No specific exception for tort laws of general application was included.

Section 514(a) was clearly intended to have broad preemptive effect, *see Wadsworth v. Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *National Carriers' Conference Committee v. Heffernan,* 454 F.Supp. 914 (D. Conn. 1978); *Hewlett Packard Co. v. Barnes,* 425 F.Supp. 1294 (N.D. Cal. 1977), *aff'd* 571 F.2d 502 (9th Cir.), *cert. denied,* 47 U.S.L.W. 3222 (U.S., October 2, 1978)(detailed reviews of the provision's legislative history), and it appears, given the connection between the allegedly tortious activities, the fiduciary obligation, and the Plan, that this provision would encompass the claims in issue here. *Hurn v. Retirement Fund Trust,* 424 F.Supp. 80 (C.D. Cal. 1976); *see Francis v. United Technologies Corp.,* 458 F.Supp. 84 (N.D. Cal. 1978). *But see American Telephone & Telegraph Co. v. Merry,* 592 F.2d 118 (2d Cir. 1979); *STONE v. STONE,* 450 F.Supp. 919 (N.D. Cal. 1978), appeal pending, No. 78-2313 (9th Cir.). The court need not resolve this question at this juncture, however, since

even assuming that plaintiff could assert a nonpreempted claim in tort, the court would decline to exercise its pendent jurisdiction to hear it.

In *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), the Supreme Court discussed various factors to be taken into consideration before a federal court exercises its pendent jurisdiction over a state law claim. It stated:

> That power [of pendant jurisdiction] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. at 726. (Citations and footnotes omitted.) The Court also noted that the substantial predomination of state issues, "whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought" and the likelihood of jury confusion in treating divergent legal theories of relief should weigh heavily in leaving the resolution of state claims to state tribunals. *Id.* at 726-27.

Consideration of these factors in the case at bar leads to the conclusion that this is not a proper case for the exercise of pendent jurisdiction. The trial of a state cause of action in tort for recovery of compensatory and punitive damages in the same proceeding as an action under ERISA to recover lost benefits would result in further complication of an already difficult and complex lawsuit. Moreover, it appears that in connection with his state tort claims, plaintiff will need to offer evidence of incidents or facts which have no bearing on the benefits

question. Thus, if the state tort claims are tried with the federal claims, the likelihood of jury[8] confusion "in treating divergent legal theories of relief" is substantial. This is particularly true since the court has dismissed plaintiff's requests for compensatory and punitive damages under ERISA while plaintiff will be able to litigate the question of such damages on his state claims. Finally, on the basis of the relief requested, it appears that the state tort issues substantially predominate plaintiff's complaint. Plaintiff's ERISA claims seek $500,000 in benefits and a penalty of $100 per day for failure to provide him with Plan information. The total relief sought in Counts V through VIII pursuant to his state causes of action amounts to $25,000,000. Accordingly, on the basis of these factors, the court DECLINES to exercise its pendent jurisdiction over the state claims set forth in these counts. *See Hurn, supra; Van Hoomissen v. Xerox Corp.*, 368 F.Supp. 829 (N.D. Cal. 1973)(Title VII).

In sum, plaintiff's motion for reconsideration is DENIED and defendants' motion to dismiss Counts V through VIII is GRANTED.

So ORDERED, this 29th day of June, 1979.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

[8] In its December order, the court determined that plaintiff is entitled to a jury trial on his ERISA claim.

APPENDIX F

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-1763

FREDERICK B. PFISTER,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before CLARK, GEE and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is granted.

APPENDIX G

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-1763

FREDERICK B. PFISTER,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

O R D E R:

IT IS ORDERED that appellant's application to recall and stay mandate and for extension of time in which to file a petition for rehearing en banc of this Court's dismissal order of July 3, 1979, is granted. Such petition shall be filed within twenty days of the filing of this order.

United States Circuit Judge

APPENDIX H

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 1, 1979

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL PARTIES LISTED BELOW:
NO. 79-1763 — FREDERICK B. PFISTER v.
DELTA AIR LINES, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court to polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By SALLY HAYWARD
Deputy Clerk

cc: Mr. Eugene J. Carella
Mr. Peter G. Nash
Messrs. David C. Garrett, III
Eugene G. Partain
Mr. Hugh E. Wright

APPENDIX I

In The United States Court Of Appeals

FOR THE FIFTH CIRCUIT

Nos. 79-1763 & 79-3207

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for stay of mandate in case No. 79-1763, and to consolidate that cause with No. 79-3207 is DENIED.

IT IS FURTHER ORDERED that appellee's motion to dismiss the appeal in case No. 79-3207 is GRANTED.

IT IS FURTHER ORDERED that appellee's motion to hold plaintiff's counsel personally responsible for costs, including attorney's fees of the appeal taken in case No. 79-3207 is REMANDED to the trial court for consideration there.

APPENDIX J

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 79-1763 and 79-3207

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appelant's motion for LEAVE TO FILE amended complaint and pleading in this court is DENIED.

IT IS FURTHER ORDERED that appellant's motion to disqualify lead counsel for the defendants-appellees is DENIED.

IT IS FURTHER ORDERED that appellant's motion for stay of all further proceedings in both the district court and this court until the lower court acts upon the motion for disqualification, is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that appellant's opposition and cross request for sanctions and its annexed petition for rehearing and suggestions for rehearing en banc are, on the court's own initiative, stricken as containing impertinent, disrespectful and unnecessarily abusive references to the district judge and to opposing counsel and parties. Fed.R.Civ.P. 12(f), *see* Theriault v. Silber, 574 F.2d 197 (5th Cir. 1978). Should counsel desire to file papers, couched in more moderate terms, seeking the relief proposed in the stricken documents, he is granted leave to do so within ten days.

APPENDIX K

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 79-1763 and 79-3207

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellant's motion for this panel to stand recused and to vacate various of its prior orders is DENIED.

IT IS FURTHER ORDERED that Appellant's petition for rehearing and for other relief lodged with Chief Judge Brown having been, by the Chief Judge's instructions, referred to the panel which entered the orders of which rehearing is sought, is DENIED.

IT IS FURTHER ORDERED that counsel for Appellant, Mr. Eugene J. Carella, before seeking to practice further before this Court, obtain admission to its Bar as required by Local Rule 5. The Clerk is directed to mail to Mr. Carella the form required by Rule 46, Fed.R.App.P. and to accept no further filings by Mr. Carella until he shall have been admitted to the Bar of this Court.

APPENDIX L

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

December 18, 1979

GILBERT F. GANUCHEAU
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

Mr. Ben H. Carter, Clerk
U. S. District Court
56 Forsyth St., NW
Atlanta, GA 30303
NOS. 79-1763 & 79-3207—
FREDERICK B. PFISTER
vs.
DELTA AIR LINES, INC., et al.
(Dist. Ct. No. C78-1567A)

Dear Mr. Carter:
Enclosed is a certified copy of this Court's order of November 13, 1979 which is reissued as and for the mandate in the above cases.
The records in each case will be returned at a later date.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

BY BRENDA HAUCK
Deputy Clerk

/bh
enclosure
cc: (LETTER ONLY)
Mr. Eugene J. Carella
Mr. Peter G. Nash
Messrs. Eugene G. Partain
David C. Garrett,III
Mr. Hugh E. Wright

APPENDIX M

United States District Court

NORTHERN DISTRICT OF GEORGIA

OFFICE OF THE CLERK
Room 100, U. S. Courthouse
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

BEN H. CARTER
CLERK

IN REPLYING, GIVE NUMBER
OF CASE AND NAMES OF PARTIES

Eugene J. Carella
5455 Wilshire Blvd.
Suite 1706
Los Angeles, California 90036

RE: FREDERICK B. PFISTER
vs
DELTA AIR LINES, INC., ET AL
C78-1567A

NOTICE

Please be advised that effective December 3, 1979, the above styled action has been reassigned to the Honorable Robert H. Hall. If you have any questions, please contact Kay Bates, Courtroom Deputy Clerk for Judge Hall at (404) 221-5207.

BEN H. CARTER, CLERK

By KAY BATES
Kay Bates
Courtroom Deputy Clerk

APPENDIX N

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FREDERICK B. PFISTER

vs.

DELTA AIRLINES, INC., et al.

CIVIL ACTION

NO. C78-1567A

ORDER

This action is currently before the court on plaintiff's motion for disqualification of the undersigned district judge. Inasmuch as this case is being transferred to Judge Robert H. Hall, who was recently appointed to this court, plaintiff's motion is DENIED AS MOOT.

SO ORDERED, this 18th day of December, 1979.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

APPENDIX O

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

**Nos. 79-1763 &
79-3207**

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

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APPENDIX P

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, c. 139, § 65, 63 Stat.99.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has

a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceedings could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

As amended December 5, 1974, Pub.L. 93—512, § 1, 88 Stat. 1609.

SEC. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; *that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest;* that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on

by means of the mails and instrumentalities of interstate commerce; *that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;* that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, *that minimum standards be provided* assuring the equitable character of such plans and their financial soundness.

(b) *It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sancations, and ready access to the Federal courts.*

(c) It is hereby further declared to be the policy of this Act to protect iinterstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued

benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

(d) CROSS REFERENCE—

SEC. 111. (a)(1) The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and events which occurred before the effective date of this part.

SEC. 404. (a)(1) Subject to sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such maters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d) (4) and (5)).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

SEC. 405. (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b)(1) Except as otherwise provided in subsection (d) and in section 403(a) (1) and (2), if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

SEC. 406. (a) Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a).

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

SEC. 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial releif as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

SEC. 501. Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

SEC. 502. (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorneys fee and costs of action to either party.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, of fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of

recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975 (e)(1) of such Code.

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation, shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

SEC. 503. In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair view by the appropriate named fiduciary of the decision denying the claim.

SEC. 506. In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this title and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize, on a reimbursable or other basis, the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this title. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this title as may be found to warrant consideration for criminal prosecution under the provisions of this title or other Federal law.

SEC. 510. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is

entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

SEC. 511. *It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act. Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both.*

SEC. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a

plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by the title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 111 and 507(b)) or any rule or regulation issued under any such law.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

(a) The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPENDIX T

United States Court of Appeals for the District of Columbia Circuit

No. 77-1371 September Term, 1977

In Re:

Frederick B. Pfister
Petitioner

Civil Action #76-1978

BEFORE: Fahy, Senior Circuit Judge; McGowan and Wilkey, Circuit Judges

ORDER

It is ORDERED by the Court, *sua sponte,* that the Clerk is directed to amend his records to reflect that Circuit Judge Wilkey cast his vote to deny petitioner's petition for writ of mandamus. It is

FURTHER ORDERED by the Court, *sua sponte,* that the Clerk is directed to amend his records on petitioner's petition for writ of mandamus by adding the following paragraph:

Senior Circuit Judge Fahy: Upon further consideration I am of the view that transfer of this case to the Northern District of Georgia Atlanta Division, would seriously endanger the ability of the plaintiff to carry forward there the litigation he has chosen to initiate in this jurisdiction. The inconvenience that defendants undoubtedly would bear in defending here does not appear to be of similar seriousness. For these reasons I think the order of the District Court to transfer the case was not within the sound discretion available to the Court. Accordingly I would grant the relief prayed by petitioner-plaintiff.

Per Curiam

Supreme Court, U.S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1451

FREDERICK B. PFISTER,

Petitioner

v.

HONORABLE NEWELL EDENFIELD
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al.,

Respondents

OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT

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DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al.,

Respondents

OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT

JURISDICTION

The order of the Court of Appeals of November 13, 1979 was reissued as the mandate on December 18, 1979. On December 5, 1979, the Court of Appeals denied a motion for the panel to stand recused and to vacate its prior orders, and the Court also denied the petition for rehearing on that date. Jurisdiction to review the orders in question is conferred on this Court by Section 2101(c), Title 28, United States Code.

QUESTION PRESENTED

1. Whether the Court of Appeals properly dismissed appeals taken from non-final, non-appealable pretrial orders which dismissed seven counts of the complaint, but left intact Count I, which demanded payment of all benefits previously terminated, reinstatement to disability status, certain civil penalties, an injunction to prevent the defendants from discriminating against the plaintiff, attorneys' fees, costs, and other relief?

STATUTES INVOLVED

The only statute drawn in question by this petition is 28 U.S.C. § 1291, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, The District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Because the petition omits certain material facts, distorts others, and fails to adequately describe the vilification of counsel and the judges of the District Court and Court of Appeals, respondents are obliged to make a counterstatement of the case.

A. Pre-Transfer Proceedings

Rather than respond to all of the allegations contained in Petitioner's Brief at 6-11, Respondents refer the Court to the complaint and the answers.

Pfister filed his complaint on October 26, 1976, and the Respondent Delta[1] promptly moved for a change of venue on December 20, 1976. After securing two extensions of time, Pfister finally filed his response to the motion for change of venue in late February, 1977. A hearing was held before Judge Joseph Waddy of the United States District Court of the District of Columbia on March 21, 1977. Ten days later, Judge Waddy issued an order granting the change of venue and transferring the case to the Northern District of Georgia.

Pfister then filed an avalanche of motions and appeals, all of which delayed the transfer of the case for one year and five months. He first moved the District Court for an order certifying an appeal under 28 U.S.C. §1292(b). That motion was denied within thirteen days. Pfister then filed a notice of appeal from the order denying certification and soon thereafter moved for an extension of time to transmit the record to the Court of Appeals.

He also petitioned the Court of Appeals for Writ of Mandamus or Prohibition to nullify the March 31, 1977 order of Judge Waddy. That motion was denied on August 2, 1977, and two weeks later Pfister moved for a stay of the transfer and of all proceedings and also requested a rehearing en banc on the motion for mandamus or prohibition. On September 20, 1977, the Court of Appeals dismissed the appeal. At that time, Pfister had not yet filed his opening Brief.

On September 24, 1977, and again on October 27, 1977, Pfister moved for a stay of the mandate pending the filing of his petition for certiorari. The Court of Appeals granted that motion to and including December 15, 1977. Two days before that deadline, Pfister filed another motion for a stay of the mandate pending his

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[1]This brief is submitted on behalf of all defendants except Charles T. Bishop, Jr. and Brewer Adjustment Company. Where used in this brief, those Respondents are collectively referred to as "Delta". The Petitioner is referred to by his name.

petition for certiorari. Pfister also filed several other motions with the Court of Appeals, which finally granted a stay to and including January 30, 1978, and ordered that no further stays would be granted.

On January 30, 1978, Pfister finally filed a petition for certiorari, which was docketed as No. 77-1068 and named Judge Waddy as a Respondent.

This Court promptly denied certiorari, whereupon Pfister requested a stay of the order denying certiorari, which was denied by Mr. Chief Justice Burger. Pfister then reapplied to suspend the effect of the order denying certiorari, which was promptly denied by Mr. Justice Brennan. Finally, on May 17, 1978, Pfister petitioned this Court for rehearing on his petition for certiorari. Less than one month later, on June 12, the petition for rehearing was denied.

On September 13, 1978, the Clerk of the United States District Court for the District of Columbia transferred the case to the Clerk of the Northern District of Georgia.

B. Post-Transfer Proceedings (District Court Rulings)

Shortly after the case was finally transferred, Delta moved to strike and/or dismiss various counts of the complaint. In an order filed December 21, 1978, the District Judge left Count I of the complaint virtually intact, but he dismissed Counts II, III and IV. He also directed Pfister to file a supplemental brief within twenty days with respect to Counts V through VIII of the complaint.

Pfister then filed a motion for reconsideration of that order, as well as a memorandum of points and authorities in response to the direction of the Court. While his motion for reconsideration was pending, on January 18, 1979, Pfister filed a notice of appeal from the order filed on December 21, 1978. Pfister then secured two extensions of time for transmission of the record in his first appeal, which was docketed as No. 79-1763.

On July 2, 1979, Judge Edenfield dismissed Counts V through VIII, and Pfister noticed a second appeal on July 30, 1979, which appeal was docketed as No. 79-3207.

Three days later, on August 2, 1979, Pfister filed a motion to disqualify Judge Edenfield. In that motion, he alleged that the District Judge is "consciously and intentionally abusing his office...under the ruse of legal exegesis", that his conduct is "grossly aberrant", "that his decision-making is motivated by extra-judicial directives and pressures more customarily referred to as political favors", that he is "beholden" to certain of the defendants' counsel, that he "issued a ruling of frivolous authority and amateurishly conceived", that he is "acting as a political pawn", that he has "knowingly and consciously, as well as willfully and wantingly [sic], maliciously abused his office", that he is "deliberately protracting [this cause] in order to cause the plaintiff maximum harm and detriment", and so on.[2]

C. Post-Transfer Proceedings (Court of Appeals Rulings)

In the first appeal taken to the Fifth Circuit (No. 79-1763), Pfister failed to file his opening brief within the time limitations, and the defendants moved to dismiss the appeal on April 20, 1979. That motion was granted on July 3, 1979, after Pfister failed to file any response to the motion. Pfister then filed an application to recall and stay the mandate and for an extension of time to file his petition for rehearing. Delta first learned of this motion when it received a copy of an order filed on August 9, 1979, which granted the motion. Pfister then filed a petition for rehearing and suggestion for hearing en banc, but that was denied on October 1, 1979.

On October 6, 1979, Pfister filed a motion for a stay in No. 79-1763 and to consolidate that appeal with the appeal in No. 79-3207.

Delta then moved to dismiss the appeal in No. 79-3207, and it also moved the Court to hold Pfister's counsel personally responsible for the costs, including attorneys' fees, of that appeal. Delta asserted that the appeal had been taken in bad faith for the purpose of delay and harassment and that attorneys' fees could therefore be

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[2]Further evidence of the unprofessional conduct of Petitioner's counsel throughout this litigation can be found in the Court of Appeals order filed November 13, 1979 (Petitioner's Appendix J), where the Court struck his entire brief "as containing impertinent, disrespectful and unnecessarily abusive references to the district judge and to opposing counsel and parties." Delta also refers the Court to Document No. 14 in the record (Motion to Disqualify Legal Counsel for the Defendants-Appellees).

taxed as part of the costs. Furthermore, Delta argued that the Court could hold Pfister's counsel personally responsible for all those costs, including attorneys' fees, under 28 U.S.C. § 1927. On the ground that the motion for stay and consolidation filed in No. 79-1763 was frivolous, dilatory and filed in bad faith, Delta also moved to hold counsel personally responsible for the costs generated by that motion.

Pfister's counsel then responded with a flood of motions in both appeals. He moved to stay all the proceedings, to disqualify legal counsel, to impose sanctions upon opposing counsel, and for leave to file an amended complaint in the Fifth Circuit. Due to delayed receipt of all of these motions,[3] Delta was unable to respond until November 5. All of its responses were returned unfiled, but nevertheless the Court denied all of Pfister's motions on November 13. In the meantime, the Court had already denied the motion for stay of the mandate in No. 79-1763 and granted Delta's motion to dismiss the appeal in No. 79-3207. As part of that order, the Court remanded Delta's motion to hold Pfister's counsel personally responsible for the costs, including attorneys' fees, of the appeal taken in No. 79-3207. That order was filed on November 5, 1979. On or about November 21, 1979, Pfister filed a motion seeking the recusal of the Fifth Circuit panel and the vacation of the orders of November 13 and November 5. He also filed a petition for rehearing with then-Chief Judge Brown on November 21, 1979. Delta did not receive a service copy of either of those motions.

On December 5, 1979 the Court of Appeals denied the motion for recusal and vacation of prior orders. It also denied the petition for rehearing, which Chief Judge Brown had referred to the panel which entered the prior orders. In addition, the Court ordered Pfister's counsel, before seeking to practice further before the Court, to obtain admission to its bar as required by Local Rule 5. The clerk was directed to accept no further findings from Pfister's counsel until such time as he obtained admission to the Bar of the Court.

[3]During the course of this litigation, it has not been unusual for Delta to receive service copies late or not at all. So that the Court can appreciate the problem and Delta's efforts to resolve it, Delta refers the Court to the exhibits to Document No. 11 in the record (Appellees' Response to Appellant's Motion for Stay and Consolidation).

Apparently Pfister's counsel also filed complaints of judicial misconduct with the Fifth Circuit, for in an order filed in February 27, 1980, Chief Judge James P. Coleman dismissed complaints filed against Judges Gee, Henderson, Hatchett, and Brown. Delta never received copies of those complaints, however.

D. Reassignment of Case

When several new district judges were appointed to the bench in the Northern District of Georgia, the judges of that Court transferred part of their cases to the newly-appointed judges in order to effect an equitable distribution of the workload. This case was one of those transferred by Respondent Judge Edenfield to Respondent Judge Hall. Accordingly, in an order filed December 19, 1979, Respondent Judge Edenfield denied Pfister's motion for disqualification as moot. On January 18, 1980, Pfister filed a notice of appeal from that order. Rather than paying the docket fee for the appeal, he filed a motion for *in forma pauperis* status with the Fifth Circuit Court Of Appeals. However, this motion should have been submitted to the District Court in the first instance under Rule 24 of the Federal Rules of Appellate Procedure. Therefore, on February 28, 1980, the Clerk of the Fifth Circuit returned, unfiled, Pfister's motion for leave to proceed *in forma pauperis* and granted Pfister thirty days within which time he might either file the motion with the District Court or pay the docketing fee. Later, Pfister's counsel contacted the office of the Clerk of the Fifth Circuit to advise that he had not received the February 28 letter, and he was granted an additional fifteen days to file any motion in the District Court.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY DISMISSED THE TWO APPEALS TAKEN FROM NON-FINAL, NON-APPEALABLE PRETRIAL ORDERS.

A "final decision" appealable under 28 U.S.C. § 1291 is one in which there is an effective "judgment", as defined by Federal Rules of Civil Procedure 54(a) and 58, "which ends the litigation ... and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229 (1945). See *Brown v. New Orleans Clerks & Checkers Union,* 590 F.2d 161 (5th Cir. 1979); *In re 1975 Grand Jury Investigation,* 566 F.2d 1293, 1296-1298 (5th Cir.), *cert. denied,* 437 U.S. 905 (1978).

In the instant case, there can be no doubt that the District Court's orders did not end the litigation. Although those orders dismissed some of Pfister's claims, the Court plainly left standing other claims, such as: Pfister's claim that he was improperly denied disability and retirement benefits, his claim against the plan administrator for civil penalties of $100 per day under 29 U.S.C. § 1132(c), and his claim that defendants be enjoined from future acts of discrimination against him personally. In short, either singly or in combination, the District Court's orders cannot even arguably be deemed a "final decision" within the meaning of Section 1291.

Nor is this a case where the District Court's orders can be deemed final, and hence appealable, under Federal Rules of Civil Procedure 54(b). The express language of Rule 54(b) provides that, in a multi-claim suit, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." See *Ryan v. Occidental Petroleum Corp.,* 577 F.2d 298 (5th Cir. 1978); *Jones v. Menard,* 559 F.2d 1282, 1284 n. 1 (5th Cir. 1977). There is nothing in the orders or otherwise in the record to indicate that the District Court made the required "express determination" or expressly directed the entry of judgment. And "[i]n the absence of such determination and direction," Rule 54(b) further provides

that "any order or other form of decision, however designated, which adjudicates fewer than all of the claims ... shall not terminate the action as to any of the claims..., and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims...of...the parties."

Apparently, Pfister believes that the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), authorizes an appeal from any order which is adverse to him. Piecemeal appeals are foreign to the federal system and ordinarily serve no purpose but to prolong the litigation interminably. That is exactly what is occurring in this case. Furthermore, the cases cited by the Petitioner, *Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964); *Land v. Dollar,* 330 U.S. 731 (1947); and *United States v. General Motors Corp.,* 323 U.S. 373 (1945), do not support his contention on appealability and jurisdiction. The issue of appealability was not dealt with in either of the latter two decisions, and this Court recently dealt with the *Gillespie* case in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 477 n. 30 (1978), as follows:

> In Gillespie, the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably "implemented the same policy Congress sought to promote in § 1292(b)," and the arguable finality issue had not been presented to this Court until argument on the merits, thereby ensuring that none of the policies of judicial enconomy served by the finality requirement would be achieved were the case sent back with the important issue undecided. In this case, in contrast, respondents sought review of an inherently nonfinal order that tentatively resolved a question that turns on the facts of the individual case; and, as noted above, the indiscriminate allowance of appeals from such discretionary orders is plainly inconsistent with the policies promoted by § 1292(b). If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.

Just as in *Western Electric Co., Inc. v. Milgo Electronic Corp.,* 568 F.2d 1203, 1206-1207 (5th Cir. 1978), the only injury

suffered by the plaintiff as a result of the District Court's orders is that he might have to return to the District Court to try those claims just as if he had waited until after trial on the remaining count to appeal. "That is not enough." *Ibid.*

II.

THE COURT SHOULD TREAT THE PETITION FOR COMMON LAW CERTIORARI AS A PETITION FOR CERTIORARI, AND IT SHOULD THEN DENY THE PETITIONS FOR CERTIORARI, MANDAMUS, PROHIBITION, AND AN INJUNCTION.

This Court's rules provide that the issuance of any writ authorized by 28 U.S.C. § 1651(a) "is not a matter of right but of sound discretion sparingly exercised." Sup. Ct. R. 30. "Mandamus is an extraordinary remedy, available only in rare cases." *Roberts v. United States District Court,* 339 U.S. 844, 845 (1950). Similarly, the writ of common law certiorari should be allowed only in extraordinary circumstances. *In re Chetwood,* 165 U.S. 443 (1897).

No such extraordinary circumstances exist in this case. The District Court orders from which appeals were taken simply struck certain counts from the complaint, and similar orders are entered in a large percentage of the cases handled in the lower courts. If this Court is called upon to review all of those orders, its already-crowded docket would become totally unmanageable. Pfister is simply attempting to chop up the litigation through piecemeal appeals and delaying tactics, all in the face of the firm congressional policy against such appeals. "The extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals." *Parr v. United States,* 351 U.S. 513, 520-521 (1956).

The situation is exacerbated even further by the fact that Pfister never filed his opening brief in either of the two appeals taken to the Fifth Circuit. Therefore, the Court of Appeals has never even considered the issues which he is now attempting to place before this Court. A review of the record clearly indicates that his purpose in taking those two appeals and then filing this petition for extraordinary writs is delay and harassment.

CONCLUSION

The petition for common law writ of certiorari should be treated by this Court as a petition for statutory certiorari and denied. The Court should also deny the petitions for other extraordinary writs so that the firm Congressional policy against piecemeal appeals will not be violated and so that this case may move expeditiously toward trial and a final resolution of the plaintiff's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition to Petition for Common Law Certiorari and Writ of Mandamus and/or Prohibition and/or Injunction to District Court and Court of Appeals for Fifth Circuit were served by depositing the same in the United States mail, with first class postage prepaid, to the following:

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